

2017 filed by the Plaintiff herein, *Patricia Musungu Shaaban*, against *Mohammed Shaaban, Damian Nthambi, Desingh Swerd, Desmond Patrick Maina* and *Pawan Kumar* the Defendants herein. The Plaintiff seeks declarations and orders relating to the property known as Kwale/Diani Beach/Block 172, which she averred was matrimonial property jointly owned with the 1st Defendant but unlawfully sub - divided and transferred to the 2nd - 5th Defendants.

2. Upon service of the pleadings and summons to enter appearance, the 1st Defendant, Mohammed Shaaban, filed his Statement of Defence on 25th April 2018. The 2nd and 3rd Defendants, Damian Nthambi and Desingh Swerd, filed their joint Statement of Defence on 19th June 2017. The 4th Defendant, Desmond Patrick Maina, filed his Amended Defence and Co - Claim on 31st January 2024 dated 8th February, 2024. The 5th Defendant, Pawan Kumar, entered appearance in person but subsequently passed away during the pendency of the suit.
3. The 1st Defendant contended that the property had been subdivided as early as 2002, thus ceasing to exist as Block 172. The 2nd and 3rd Defendants claimed to be bona fide purchasers for

value with notice of Block 1359 in 2012. The 4th Defendant, through an Amended Defence and Co - Claim, asserted that he purchased Block 1360 in 2015 for value and without notice of any illegality. The Plaintiff filed replies denying these claims and maintained that the sub - division and transfers were illegal, null and void, being undertaken during the pendency of matrimonial proceedings in HCCC No. 3 of 2014.

4. It is instructive to note that during the pendency of these proceedings, there was an attempt to explore an out of Court negotiation between the Plaintiff and the 4th Defendant herein. This was encouraged by Court as it was in tandem with the Judiciary policy on Social and Transformation on Access to Justice (STAJ) and the Alternative Justice System (AJS) anchored under the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Sections 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011. Unfortunately, the said negotiations became a cropper.

II. Description of the Parties

5. Patricia Musungu Shaaban, the Plaintiff, is an adult female of sound mind, formerly married to the 1st Defendant, and a resident of

Kenya. She was a litigant in Mombasa HCCC No. 3 of 2014, wherein the property known as Land Reference Number Kwale/Diani Beach/Block 172 was declared matrimonial property to be shared equally between herself and the 1st Defendant.

6. The Defendants are adults of sound mind residing within Kenya. The 1st Defendant, Mohammed Shaaban, is the former husband of the Plaintiff. The 2nd Defendant, Damian Nthambi, and the 3rd Defendant, Desingh Swerd, are purchasers of portions of the disputed property. The 4th Defendant, Desmond Patrick Maina, claims ownership of Plot No. Kwale/Diani Beach/Block 1360 through a sale agreement dated 24th September 2015. The 5th Defendant, Pawan Kumar, initially appeared in person but passed away during the pendency of this suit.

III. Court directions before the hearing

7. On 30th March 2017, upon perusal of the Plaintiff's application dated 28th March 2017 together with the supporting affidavit and annexures, the Court (Hon. Justice C. Yano) certified the matter as urgent and granted interim orders in terms of prayers 1 and 2, directing service within seven days for '*inter - partes*' hearing.

8. On 20th April 2017, the matter came before Hon. Justice A. Omollo. The Plaintiff sought leave to serve the 2nd and 4th Defendants by way of substituted service. The Court granted the application and directed that the Defendants enter appearance within twenty-one days of advertisement. The 1st, 3rd and 5th Defendants were ordered to file their responses within forty-five days.
9. On 21st June 2017, the matter was mentioned before Hon. Justice C. Yano. The Plaintiff confirmed service on all Defendants, including the 4th Defendant by advertisement. The Court granted the 2nd and 3rd Defendants leave to file their responses within fourteen days and fixed the hearing of the application dated 28th March 2017 for 25th September 2017. Interim orders were extended.
10. On 25th September 2017, the Court granted the 1st and 5th Defendants fourteen days to file submissions. Subsequently, on 4th October 2017, interlocutory judgment was entered against the 1st, 4th and 5th Defendants for failure to enter appearance or file defence within the prescribed time.
11. Between 2018 and 2020, the matter proceeded through pre-trial directions, interlocutory applications, and adjournments occasioned by the Defendants. On 19th December 2019, the hearing was

adjourned due to the indisposition of counsel for the 1st Defendant. On 16th November 2020, the Court granted a final adjournment, noting repeated delays.

12. On 22nd June 2021, the matter was listed for hearing before Hon. Justice C. Yano. The Plaintiff indicated readiness to proceed notwithstanding the demise of the 5th Defendant. The Court declined further adjournments and directed the matter to proceed.
13. On 22nd July 2021, the Court noted that an Environment and Land Court had been established at Kwale. By consent of the parties, the matter was transferred from Mombasa ELC to Kwale ELC for hearing and determination.
14. On 21st March, 2022 the Honourable Court reserved 13th June, 2022 for hearing of the case where the Plaintiff proceeded with her hearing and marked her case closed. The 1st Defendant testified on 13th June, 2022 and marked his case closed. On 10th February, 2025, the 2nd and 3rd Defendant called their witness after which they marked their case closed. The 4th Defendant called their witness on 25th March, 2025 and marked their case closed. The Plaintiff was further called for cross examination on 25th July, 2025 after which

the Plaintiff closed her case and the parties were directed on submissions.

IV. The Plaintiff's case

15. Sometime in the year 2006, the Plaintiff commenced proceedings against the 1st Defendant through HCCC No. 1088 of 2006, which was subsequently consolidated with HCCC No. 163 of 2012 (formerly SRMCC No. 159 of 2006). The consolidated matter was thereafter allocated a new case number, namely Mombasa HCCC No. 3 of 2014. The aforementioned suit was heard and determined by the High Court, which delivered its Judgment on 8th February 2016. In that judgment, the Court declared the suit property known as Kwale/Diani Beach/Block 172 to be matrimonial property jointly owned by the Plaintiff and the 1st Defendant in equal shares, and directed that the same be shared between them.
16. Unknown to the Plaintiff and the Court, sometime in the year 2011 the 1st Defendant had illegally, and during the pendency of the aforementioned suit, transferred and/or sub - leased the suit property known as Kwale/Diani Beach/Block 172 to third parties, namely the 2nd, 3rd, 4th and 5th Defendants. The property was sub -

divided into Plots Nos. 1359, 1360, 1361 and 1362, all registered in the names of the Defendants.

17. As a consequence, the Plaintiff was unable to register the decree extracted from the Judgment delivered in Civil Suit No. 3 of 2014 (OS) and continued to suffer loss and irreparable damage, as her right to own property was infringed upon by the Defendants' sub - division.
18. The Plaintiff prayed that the aforementioned transfer and/or sub - division of Kwale/Diani Beach/Block 172 to the 2nd, 3rd, 4th and 5th Defendants, and any subsequent dealings thereto, be declared illegal, null and void, revoked or cancelled with immediate effect, and that the property revert as enumerated in the Judgment delivered in Civil Suit No. 3 of 2014 (OS).
19. Despite demand and notice of intention to sue having been issued, the Defendants refused and failed to comply, thereby rendering the present suit necessary.
20. There was no other suit pending, and there had been no previous proceedings in any court between the parties herein over the subject matter. This Honourable Court had jurisdiction to hear and determine the case.

21. The Plaintiff prayed for Judgment to be entered against the Defendants jointly and severally:-

- a) A declaration that the transfer and/or subdivision of plot no. Kwale/Diani Beach/Block 172 into Plot nos. 1359, 1360, 1361 and 1362 to the 2nd, 3rd, 4th and 5th Defendants and any other Sub -divisions thereto is illegal, null and void.**
- b) An order directing the Kwale District Land Registrar to cancel or revoke titles to Plot Nos.1359, 1360, 1361 and 1362 and any other illegal resultant sub - divisions in respect to Plot no. Kwale/Diani Beach/ Block 172.**
- c) A mandatory order directing the Kwale District Land Registrar to reinstate the original title plot no. Kwale/Diani Beach/ Block 172 for subdivision in terms of the decree issued on 19th February 2016 by the court in civil suit number 3 of 2014 (OS).**
- d) Costs of this suit**
- e) Interest on(d)**
- f) Any other relief as the court may deem fit to grant**

22. The Plaintiff responded to the 4th Defendant's Amended Defence and Defence to Counter - Claim by stating that: -

- a. Save where expressly admitted, the Plaintiff denied each and every allegation in the 4th Defendant's Amended Statement of Defence and Co - Claim and reiterated the contents of her Plaint dated 28th March 2017, which had been filed herein verbatim.
- b. In response to Paragraphs 2, 3, 4 and 5 of the 4th Defendant's Amended Statement of Defence and Co-claim, the Plaintiff

reiterated the contents of Paragraphs 7, 8 and 9 of her Plaint dated 28th March 2017 and further stated that she was a stranger to the 4th Defendant's allegations, as she was not privy to the alleged contract between the 1st Defendant and the 4th Defendant. The 4th Defendant was therefore put to strict proof of his allegations to the contrary.

- c. In response to Paragraphs 9, 10, 11, 12, 13 and 14 of the 4th Defendant's Amended Statement of Defence and Co - Claim, the Plaintiff reiterated the contents of Paragraphs 7, 8, 9, 10, 11 and 12 of her Plaint dated 28th March 2017 and further stated that it had been incumbent upon the 4th Defendant to conduct due diligence before proceeding to purchase a portion of the suit property.
- d. The Plaintiff emphasized that the doctrine of bona fide purchaser for value without notice did not apply to an ignorant party who failed to conduct due diligence before purchasing land. As such, she denied the contents of Paragraphs 9, 10, 11, 12, 13 and 14 of the 4th Defendant's Amended Statement of Defence and Co - Claim in toto and consequently put the Defendant to strict proof thereof.

e. The Plaintiff therefore prayed that the 4th Defendant's Amended Statement of Defence and Co - Claim be dismissed with costs for failing to disclose any triable issues.

23. On the Defence to the Counter - Claim, the Plaintiff averred as follows: -

- a) In response to Paragraphs 17 and 18 of the 4th Defendant's Co - Claim, the Plaintiff reiterated the contents of Paragraphs 1 to 14 (both inclusive) of her Plaint dated 28th March 2017, as well as Paragraphs 1 to 5 (both inclusive) of her Reply to the 4th Defendant's Amended Statement of Defence and Co - Claim verbatim.
- b) The Plaintiff stated that since she was not privy to the contract between the 1st Defendant and the 4th Defendant, she was a stranger to the contents of Paragraphs 19, 20 and 21 of the 4th Defendant's Counter - Claim, and as such, the 4th Defendant was put to strict proof thereof.
- c) Further to Paragraph 7 above, and in response to Paragraphs 22, 23 and 24 of the 4th Defendant's Counter - Claim, the Plaintiff maintained that the alleged sale and consequent registration of Plot No. Kwale/Diani Beach/Block 1360 in favour of the 4th

Defendant had been illegal and in contravention of the doctrine of *lis pendens*. She argued that the said sale and subsequent registration in favour of the 4th Defendant ought to be nullified for being void ab initio.

d) In response to paragraph 25 of the 4th Defendant's Counter - Claim, the Plaintiff maintained that since she was not privy to the contract between the 1st Defendant and the 4th Defendant, any claims for indemnity by the 4th Defendant should have been directed to the 1st Defendant. As such, the contents of Paragraph 25 of the 4th Defendant's Counter - Claim were denied in toto and the 4th Defendant was put to strict proof thereof.

24. For the reasons wherefore, the Plaintiff prayed that: -

a) Judgment be entered in favour of the Plaintiff as prayed in the Plaintiff's Plaint dated 28th March, 2017.

b) The 4th Defendant's Amended Statement of Defence and Co - Claim be dismissed with costs.

25. On 13th June, 2022 at 11.00 am, the Plaintiff testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Ndambuki holding brief for Mr. Wafula Advocate.

26. PW - 1 testified and was sworn on oath in Swahili language. She is called PATRICIA MUSUNGU SHAABAN, a citizen of Kenya and holding the national identity card bearing the details as shown to Court. The

that the suit property belonged to her husband and that it had come late. She lived in Owini. She had written a statement on 28th March 2017 and wished to adopt it as her evidence in chief. She confirmed that she knew the 1st Defendant being her former husband. They had been married for many years. She had sued him in the HCCC Case No. 3 of 2014, where she obtained Judgment against him and in her favour. She explained that she had commenced the divorce proceedings in the year 2006. After hearing the matter, the honourable court delivered its Judgment in the year 2016. She brought to court a copy of the Judgment dated 8th February 2016, as contained in the Plaintiff's list of documents dated 28th March 2017, and produced it as her evidence marked PW - 1 Exhibit 1.

27. Out of the Judgment, a Decree was issued on 19th February 2016, which she produced as her evidence, as contained in the Plaintiff's list of documents dated 19th February 2016, marked as PW - 1 Exhibit 2. Following the Judgment, she went to the Land Registrar to seek information on the land, but they discovered that the land it had already been sub - divided. She referred to an application form dated 25th February 2016 (see item 3) and produced it as evidence marked as PW - 1 Exhibit 3.

28. It was established that the land had been sub - divided and sold to other people. The land in question was Land Reference Number Diani/Kwale Plot 172, also referred to as Kwale/Diani Block 172. She referred to the 1st Defendant's witness statement filed on 25th April 2018 at paragraph 3, which indicated that the 1st Defendant had sub - divided the land in year 2002. At that time, they were living together, yet he had not informed her of this development. She was not aware nor given her consent. During the divorce proceedings in the year 2006, the 1st Defendant never informed the court that he had sub - divided the plot. The proceedings continued without the knowledge of Court nor the parties.

29. She further referred to the 2nd and 3rd Defendants' Statement of Defence dated 19th June 2017 at paragraph 3, which stated that they had bought the land in the year 2012. She emphasized that in the year 2012 the case was still pending in court. She prayed that the court transfers her 50% share and that the 2nd and 3rd Defendants returns the land. She requested the court to grant the prayers as per the Plaintiff's claim dated 28th March 2017.

B. Cross examination of PW - 1 by Mr. Omollo Advocate.

30. PW - 1 confirmed having gone to court in the year 2006. By that time, she had not been aware that Plot No. 172 had been sub - divided. She only discovered this fact after the Judgment had been delivered and after presenting it to the Land Registry. She confirmed that she had not seen the sub - division report/Mutation Form. When referred to documents 2 and 3 and the 1st Defendant's list of documents, she stated that she had never seen the letter from the Director of Surveys and insisted that the 1st Defendant was lying. Her issue, she explained, was that the 1st Defendant had never informed her nor the court about the sub - division of the suit land.

31. She acknowledged that she had seen the map but maintained that the sub - division had been done without her knowledge. She stated that they had filed a new case and had not gone back to the court that issued the decree, as they had other properties in issue. Plot No. 172 was not the only property referred to in the Judgment. She explained that she had not returned to court because the court had already decided the matter.

32. PW - 1 acknowledged that she had seen the map but maintained that the sub - division had been done without her knowledge. She stated that they had filed a new case and had not gone back to the

court that issued the decree, as they had other properties in issue. She reiterated that Plot No. 172 was not the only property in the Judgment. She explained that she had not returned to court because the court had already decided the matter.

33. She testified that she had registered a Caution against Plot No. 172 in 2006, but it was not among the exhibits she had produced. She reiterated that the 1st Defendant had not informed the court about the sub - division and had never appeared in court during the proceedings. At page 1 of the Judgment, she read out the first line and noted the date 29th November 2012, when the Amended Originating Summons was granted. She denied that all the cases had been filed in the year 2006. She clarified that they were separate and distinct. They concerned both divorce and property.

C. Cross examination of PW - 1 by Mr. Mungai Advocate.

34. PW - 1 testified that she was before the Court to enforce the Judgment emanating from the divorce case. She stated that on 8th February, 2016, she had been given what she asked for in the Judgment, namely Plot No. 172. She explained that she had seen the

defence which indicated that as at 2016 the land had already been sub - divided. She disagreed with the assertion that the plot she was asking for did not exist. She confirmed that she had seen the Amended Originating Summons referred to in the Judgment and noted the date 29th November 2012. She agreed with the date but maintained that although the plot had been sub - divided by then, she could not tell the exact date of sub - division.

35. PW - 1 stated that she did not know the 3rd Defendant well. She only knew that he was a neighbour. She had known him for a short time. At the time of filing the divorce proceedings, she confirmed that the registered owner of the property was her husband, the 1st Defendant. She testified that she did not know how the 3rd Defendant came to purchase the plot, but believed he had bought it before 29th November 2012 while the suit was still progressing.

36. PW - 1 admitted that she had not conducted a search to know the current owners, as she felt there was no need. She stressed that she only came to know of the challenges in ownership after the Judgment, when her lawyer went to Kwale. She disagreed with the suggestion that her husband had the right to sell the property, insisting that one could not sell family property acquired together.

She stated that she was not aware that a sole registered owner had the right to sell without spousal consent. She confirmed that she was now aware that the 2nd and 3rd Defendants were the registered owners of Plot No. 1359, and that was why she had sued them to recover the land from them.

37. PW - 1 admitted that she had not raised any allegations of fraud against the 2nd and 3rd Defendants and had not stated any illegalities, acknowledging that it meant they had bought innocently from the 1st Defendant. She stated that she did not know the grounds upon which a title could be revoked. She testified that after reading that Plot No. 172 no longer existed, she was not aware of any rectification call. She concluded that all she knew was that they had the present case before the Court.

D.Re - examination of the PW - 1 by Mr. Ndambuki Advocate.

38. PW - 1 read from the title of the Judgment (formerly Civil Suit No. 1088 of 2006) at paragraph 8, line 1, dated 18th December 2006. Therefore, she clarified that it was not true that she had filed the matter on 29th November 2012 in the year 2006. She stated that she

had seen the sale agreement dated 6th January 2012, confirming that the property had been sold in year 2012 while the matter was still ongoing.

39. On the issue of fraud. She was referred to the contents of Paragraph 9 of the Plaint. She confirmed that the sub - division had taken place during the pendency of her other case. She further confirmed that she had seen the letter from the Survey Department but reiterated that she had not witnessed the sub - division taking place, despite living on the property at the time.
40. PW - 1 emphasized that it was not right for her husband to sell the property alone. They had bought it together and he was obligated to inform her. She concluded by stating that there was no appeal preferred against the Judgment by the 1st Defendant or any other party. The Judgment remained intact, valid and binding.
41. On 13th June, 2022, the Plaintiff closed his case through his Legal Counsel on record Mr. Ndambuki Advocate. However, by the leave of Court under the provision of Order 18 Rule 10 of the Civil Procedure Rules, 2010 and Section 146 Rule 4 of the Evidence Act, Cap. 80, on 25th July, 2025 at 11.30 am, the Plaintiff was recalled for cross examination where she testified that: -

E. Further cross examination of PW - 1 by M/s Warhiu Advocate.

42. PW - 1 took oath and testified in English language. She stated that she was the Plaintiff in the suit and that she had once been married to the 1st Defendant in year 1984 until 2006, when she filed the case for divorce. She confirmed that she obtained a Decree in the year 2016. She explained that the mother file for the property had been acquired in the year 2002 and that she had contributed to the purchase price. She testified that the subject property was sub - divided in the year 2011, but she was not aware of the said sub - division. Therefore, she never benefited from it.
43. PW - 1 stated that she did not believe she occupied any of the sub - divisions, but rather believed she occupied Plot No. 172, Diani, which was the original parcel measuring 4.2 hectares. She maintained that she lived on Plot No. 172 and was not aware of any sub - division. She testified that there had already been a restriction/caveat registered before they filed the case and that she knew there was one on Plot No. 172 as per the court order. She stated that she was not aware that Plot No. 172 no longer existed.

She explained that she became aware of the 4th Defendant and others occupying the plot adjacent to her own, namely Plot No. 172.

44. PW - 1 confirmed that the matrimonial property had been sold and that they raised the issue with the Land Registrar. She stated that they obtained the injunction order they had applied for. The issue of restriction was being handled by her advocates. She testified that she was not aware that there had been approval for Plot No. 1360, which the 4th Defendant obtained in the year 2016 while the matter was still pending in court.

45. When it was put to her that there had been no restriction on the land, she responded that she was not conversant with that. She explained that she had filed the case in year 2016 immediately after the Judgment in the matrimonial cause was delivered and that she was aware restrictions had already been registered. She confirmed that they had applied for cancellation of the title.

46. When it was put to her that the sub - division was assumed to have been done with her consent, she referred to the letter dated 6th April 2011 by the Director of Surveys, Mr. H.F. Jumra, and stated that its contents were a lie and a misrepresentation of facts, as she had

never given any consent herself. She reiterated that she had not been aware of the sub - division.

47. PW - 1 emphasized that she was only concerned with Plot No. 172 and was awaiting its sub - division on a 50:50 basis. She admitted that after the Judgment she had never taken Mr. Shaaban back to court for execution, that they had never agreed on anything, and that he had never appealed against the court's decision. She concluded that when Mr. Shaaban refused to comply, she had not taken anything from him and neither had he offered her anything.

F. Re - Examination of PW - 1 by Mr. Wafula Advocate.

48. PW - 1 testified that the case in the High Court had been heard in the year 2016. She explained that it concerned the division of Property No. 172, which had been declared matrimonial property. She stated that she had sued Mr. Shaaban, who participated in the proceedings until Judgment was delivered.

49. PW - 1 confirmed that the Court had decided that the suit property be divided equally, on a 50:50 basis. She explained that in respect of Plot No. 172, the Court had ordered that she receive half of it. However, when she attempted to execute the decree, it was not

possible because the property had already been sub - divided in the year 2011 while the matter was still pending.

50. PW - 1 emphasized that the object of the present ELC case was to secure her 50% share of Plot No. 172. She stated that the other Defendants could derive their shares from Mr. Shaaban's 50%, but her entitlement to half of the property had to be protected. She testified that she had been unable to obtain her share due to the existence of the sub - divisions and confirmed that she was pressing for the resultant titles to be revoked. She concluded that in the long run, the said titles ought to be cancelled so that her 50% share could be realized and/or secured.
51. On 25th July, 2025, the Plaintiff marked her case closed through her counsel on record Mr. Wafula Advocate.

V. The 1st Defendant's case

52. The 1st Defendant responded to the Plaint through a Statement of Defence where he admitted the contents of Paragraphs 1, 2, 3, 4, 5 and 6 of the Plaint in so far as they were descriptive of the parties. The 1st Defendant denied the contents of Paragraphs 7 and 8 of the Plaint and put the Plaintiff to strict proof thereof.

53. In answer to paragraph 9 of the Plaint, the 1st Defendant denied that he had illegally transferred and/or sub - leased Plot No. Kwale/Diani Beach Block/172. The 1st Defendant denied the allegations made in Paragraphs 9 and 10 of the Plaint and put the Plaintiff to strict proof thereof.

54. The 1st Defendant stated further that in the year 2002 he had caused Plot No. Kwale/Diani Beach Block/172 to be sub - divided into several parcels namely:- Land Reference Numbers Kwale/Diani Beach Block/1359, 1360, 1361 and 1362. Consequently, as of 5th September 2002, Plot No. 172 had ceased to exist and had been replaced by the aforesaid sub - divisions. Therefore, he contended that when the Plaintiff commenced action in the suits mentioned in Paragraph 7 of the Plaint, Plot No. 172 had already ceased to exist. The 1st Defendant denied the contents of Paragraph 12 of the Plaint and put the Plaintiff to strict proof thereof. The 1st Defendant admitted the contents of Paragraphs 13 and 14 of the Plaint.

55. For these reasons, the 1st Defendant prayed that the Plaintiff's suit be dismissed with costs.

56. The 1st Defendant also responded to the 4th Defendant's Amended Statement of Defence and Counter - Claim in the following terms: -

- a. The 1st Defendant joined issue with the 4th Defendant on his defence wherever such defence consisted of averments contrary to those contained in the 1st Defendant's Defence.
- b. The 1st Defendant stated that the 4th Defendant had no right to file a Counter - Claim against him and, as such, the 4th Defendant's Counter - Claim was incompetent and bad in law.
- c. The 1st Defendant added that, in any event, the 4th Defendant's Counter - Claim was speculative and disclosed no reasonable cause of action against him.

57. The 1st Defendant prayed that the 4th Defendant's Counter - Claim be dismissed with costs.

58. The 1st Defendant testified on 13th June, 2022 where he stated that:-

A. Examination in chief of DW - 1 by Mr. Omollo Advocate.

59. DW - 1 was sworn and in English language. He was called MOHAMMED SHAABAN, a citizen of Kenya and holder of the national identity card bearing all the particulars as indicated on it and shown to Court. He confirmed that he was the 1st Defendant and that he resided in Diani. He stated that he had signed a witness statement dated 24th April 2018 and wished to adopt it as part of his evidence. He further testified that he had a list of documents dated 24th April

2018, specifically document No. 4, and that he had also brought with him a certified copy. He produced them as his evidence, marked as DW - 1 Exhibit numbers 1-4.

60. DW - 1 stated that he could not say whether he had or had not informed the Plaintiff of the sub - division. He maintained that the property had been his, purchased with his own money. He testified that by the time the suit had been filed, Plot No. 172 no longer existed in the Judgment.

61. DW - 1 explained that he had seen the list of properties in the Judgment but asserted that those things did not exist because, by the time of Judgment, they had already ceased to exist. He stated that he had only attended court once, that he had not given evidence in the matrimonial proceedings, and that he only came to know of the outcome afterwards. He added that at times they had been told that the court file was missing.

B. Cross examination of DW - 1 by Mr. Mungai Advocate.

62. DW - 1 testified that he had been the sole registered owner of Plot No. 172 before its sub - division. He stated that he had bought the property himself and that all the money used for the purchase had come from him. He confirmed the sub - divisions as per the map he

had produced and further confirmed that he had sold the property to the 2nd and 3rd Defendants. He maintained that they had followed all due process for the transfer legally.

63. DW - 1 emphasized that the 2nd and 3rd Defendants had not been parties to the divorce proceedings and had not been aware of what he termed false proceedings. He insisted that they had bought the property legally from him. He testified that the 2nd and 3rd Defendants had been his neighbours, residing at a distance of about five metres. He added that the Plaintiff ought to have been aware of the sub - division because the Defendants had been building walls and surveyors had come to the property for a whole day.

C. Cross - examination of DW - 1 by Mr. Ndambuki Advocate.

64. DW - 1 confirmed that the divorce case had been filed in year 2006 and that he had been represented by a lawyer in those proceedings. He referred to paragraph 8 of the Judgment. He read it out. It confirmed that he had filed his response. He stated that he had taken steps to know what was going on and was aware of the proceedings. He admitted that he had entered into the sale agreement while the divorce proceedings were ongoing. He acknowledged that he had never informed the court that Plot No.

172 no longer existed. He testified that before the filing of the divorce proceedings, their matrimonial home had been built on Plot No. 172.

65. DW - 1 stated that, as the head of the house, he had made the decision to sell the property without informing his family. He agreed that his children had needed shelter but explained that they also needed money, and since the plot was in his name. He had proceeded with the sale without informing them.

66. DW - 1 admitted that he had not filed an appeal against the Judgment, acknowledging that it was a lawful order. He explained that since the property no longer existed, he had not gone back to court to enforce the Judgment, either by way of appeal or review.

D.Re - examination of DW - 1 by Mr. Omollo Advocate.

67. DW - 1 testified that he had seen the Judgment, but according to the Judgment, the relevant date was 19th November 2012. He stated that as at that date, Plot No. 172 did not exist. He further confirmed that he had never been cited for contempt of court.

68. The 1st Defendant marked his case closed on 13th June, 2022 through his counsel Mr. Omollo.

VI. The 2nd and 3rd Defendant's case

69. The 2nd and 3rd Defendants contested through a Statement of Defence the contents of the Plaintiff and stated that: -

- a. The 2nd and 3rd Defendants admitted the contents of Paragraphs 1, 3 and 4 of the Plaintiff in so far as they were merely descriptive of the parties. They added that their address for service for the purposes of the suit had been care of Mungai Kamau & Co. Advocates, Shree Plaza, Ground Floor, Beach Road, P.O. Box 5291 - 80401, Diani Beach.
- b. The 2nd and 3rd Defendants stated that they were strangers to the contents of Paragraphs 7 and 8 of the Plaintiff.
- c. They averred that they had purchased Kwale/Diani Beach Block/1359 legally from the 1st Defendant vide a sale agreement dated 6th January 2012.
- d. They contended that as at the time of delivery of Judgment in HCCC No. 3 of 2014 on 8th February 2016, the said land was not matrimonial property.

- e. The 2nd and 3rd Defendants averred that there had been no order to the Registrar of Lands, Kwale Lands Registry, barring him from registering Kwale/Diani Beach Block/1359.
- f. They further averred that the sub - divisions arising out of Kwale/Diani Beach Block/172 had been done legally and that the subsequent owners of the sub - divisions were bona fide and lawful owners of the plots.
- g. The 2nd and 3rd Defendants contended that the Plaintiff had sat on her rights and that her claim at that stage had been overtaken by events. They argued that if she had any claim, the same should only have been directed against the 1st Defendant.
- h. They asserted that the suit was an abuse of the court process since the decree vesting the Plaintiff with matrimonial property had been very specific on the property declared matrimonial, and Kwale/Diani Beach Block/1359 was not among them.
- i. They argued that the Plaintiff's suit was an attempt to have the Court declare her the owner of Kwale/Diani Beach Block/1359 unprocedurally.

j. The 2nd and 3rd Defendants maintained that they were the registered owners of Kwale/Diani Beach Block/1359 and that their title could not be impeached unless it had been obtained through fraud, which was not the case.

k. They admitted the jurisdiction of the Court.

70. The 2nd and 3rd Defendants prayed that the Plaintiff's suit be dismissed with costs.

71. The 2nd and 3rd Defendants called their first witness DW - 2 on 10th February, 2025 at 1.30 pm wherein the witness testified but before that their counsel on record gave the following opening remarks: -

A. Opening remarks by Ms. Mkabane Advocate.

72. Counsel for the 2nd and 3rd Defendants stated that they were before the Court to defend their title by virtue of being bona fide innocent purchasers for value without notice. The sale and ownership relating to the property in question. The Counsel indicated that they would only be calling one witness.

B. Examination in Chief of DW - 2 by Ms. Mkabane Advocate.

73. DW - 2 was sworn and testified in English language. He identified himself as DESINGH SVERD. He confirmed that he had recorded his witness statement dated 7th August 2017 and wished to adopt it as

part of his evidence in chief and in support of his case. He testified that in the year 2011 he had been approached by Mr. Shaaban regarding the purchase of the beach plot known as Kwale/Diani Beach Block/1359. He stated that he had conducted an official search dated 16th December 2012, which he produced as Defence Exhibit 1, together with a copy of the green card marked as Defence Exhibit 2.

74. DW - 2 explained that he had agreed to the purchase and that a sale agreement had been drawn dated 6th January 2012, which he produced as Defence Exhibit 3. He further testified that he had been issued with a Certificate of Lease in the names of Damian Nthambi Dessingh and Desingh on 30th April 2012, which he produced as Defence Exhibit Number 4.

75. DW - 2 stated that in the year 2013 they had constructed a perimeter wall on the property and had been paying rates as required by the County Council. He emphasized that he had not been aware that there was a matrimonial cause or that the property had been matrimonial property.

C. Cross - Examination of DW - 2 by Mr. Ndambuki Advocate.

76. DW - 2 was referred to the Plaintiff's documents at pages 26 to 37, dated 28th March 2017, and specifically to the Judgment at page 27 in the civil case of:- "**HCCC (OS) No. 3 of 2014 (formerly Civil Suit No. 1088 of 2008, Patricia Musunga Shaaban - Versus - Mohammed Shaaban)**". He confirmed that from Paragraph 1 of the Judgment, the Petitioner had been seeking division of property, including Kwale/Diani Beach Block/172.
77. DW - 2 acknowledged that the Judgment in that matter had been delivered on 8th February 2016. He further confirmed that at paragraph 2(b) of the Judgment, the Court had issued an order declaring Kwale/Diani Beach Block/172 to be matrimonial property and directed that it be divided equally between the Applicant and the Respondent.
78. DW - 2 testified that the property he had purchased, Kwale/Diani Beach Block/1359, had been a result of the subdivision of Plot No. 172, the mother title. He stated that he had bought the property on 6th January 2012. He admitted that he had a duty to conduct due diligence, including investigating the root of the title. He explained that the search he conducted had confirmed that the property belonged to Mohammed Shaaban. He admitted that he had never

visited any court precinct to find out whether the property was subject to litigation, stating that such was not the procedure. He further admitted that he had never visited the property before purchase, had not interviewed any neighbours, and had not asked Mr. Shaaban whether he had a wife or family in relation to the purchase. He stated that the issue of spousal consent had not been an issue by the year 2016.

79. DW - 2 testified that when he conducted the search, it had shown that the property was only in the name of Shaaban. He explained that when he later found out about the Judgment, it confirmed that the property had been Mohammed's. He admitted that he had not sought a review or indicated his interest in the matter. He added that had he known there was a court case, he would not have bought the property. He was referred to the application for registration of Plot No. 1359 dated 25th February 2016, in which the Land Registrar had indicated that he was unable to register the decree because the parcel had already been sub - divided into Parcel Nos. 1361, 1362, 1359 and 1360.

D. Cross - examination of DW - 2 by Mr. Omollo Advocate.

80. DW - 2 confirmed that the lease had been registered on 30th April 2012. He acknowledged that the law on spousal consent under Section 93 of the Land Registration Act, No. 3 of 2012 had come into effect on 2nd May 2012. He testified that his plot was Kwale/Diani Beach Block/1359, while the matrimonial property had been Plot No. 172. He stated that he did not know when Plot No. 172 had been sub - divided.

E. Re - examination of DW - 2 by Ms. Mkabane Advocate.

81. DW - 2 testified that before conducting the purchase of the property, he had carried out due diligence. He stated that prior to the purchase, he had not been aware of the property. He explained that after purchasing the property, he had never been enjoined as a party to the suit. He further testified that, to the best of his knowledge, by the time of purchase, Plot No. 172 no longer existed.

82. The 2nd and 3rd Defendants closed their case through their counsel on record Ms. Mkabane Advocate on 10th February, 2025.

VII. The 4th Defendant's case

83. The 4th Defendant responded to the Plaint through his Amended Statement of Defence and Counter - Claim and averred as follows: -

- a) The 4th Defendant admitted the contents of paragraphs 1, 2, 3, 4, 5 and 6 of the Plaintiff in so far as they were descriptive of the parties.
- b) Save for what was specifically admitted, the 4th Defendant denied each and every allegation contained in the Plaintiff as if the same had been set out verbatim and traversed seriatim.
- c) The 4th Defendant stated that he was a stranger to the contents of Paragraphs 7 and 8 of the Plaintiff, as he had not been a party to the suits mentioned therein, and the Plaintiff was put to strict proof thereof.
- d) In response to Paragraph 9 of the Plaintiff, the 4th Defendant denied the allegations in toto and put the Plaintiff to strict proof thereof. He clarified that he had purchased Kwale/Diani Beach Block/1360 from the 1st Defendant vide a Sale Agreement dated 24th September 2015, which had been in accordance with Section 3(3) of the Law of Contract Act, Cap. 23.
- e) The 4th Defendant averred that he had not been privy to any illegality in respect of the subdivision of Kwale/Diani Beach Block/172.

- f) He maintained that having legally purchased Plot No. 1360 before the determination of HCCC No. 3 of 2014, he was the legal owner of the property.
- g) The 4th Defendant denied the contents of Paragraph 10 of the Plaintiff and put the Plaintiff to strict proof thereof.
- h) In response to Paragraph 11 of the Plaintiff, he reiterated that he had legally purchased Plot No. 1360 from the 1st Defendant and was therefore the legal owner. He denied the Plaintiff's allegations and put her to strict proof thereof.
- i) He further averred that he had been a bona fide purchaser for value, holding a certificate of title, having purchased the property in good faith, without knowledge of any alleged illegalities, and not being party to any fraud committed by the 1st Defendant.
- j) He emphasized that under the Registration of Titles Act and the Torrens system, the title of a bona fide purchaser for value without notice of fraud could not be impeached.
- k) The 4th Defendant contended that the Plaintiff's suit was mischievous and a veiled attempt to deprive him of his proprietorship rights over Plot No. 1360.

l) He denied ever being served with a demand or notice of intention to sue as alleged in Paragraph 12 of the Plaint and put the Plaintiff to strict proof thereof.

m) The 4th Defendant admitted the contents of Paragraph 13 of the Plaint and admitted the jurisdiction of the Court.

n) The 4th Defendant prayed that the Plaintiff's suit be dismissed with costs.

84. The 4th Defendant had a Counter - Claim in which he contended as follows: -

a. The Plaintiff to the Counter - Claim reiterated the averments contained in the Defence.

b. Without prejudice to the foregoing, the 4th Defendant averred that by a Sale Agreement dated 24th September 2015, made between himself as Purchaser and the 1st Defendant as Vendor, he had purchased Kwale/Diani Beach Block/1360 at a consideration of a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=).

c. The 4th Defendant set out the particulars of the contract to include:-

- i. That the Defendant would sell and the Plaintiff would purchase Plot No. 1360 for a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=).
 - ii. That the property was owned and registered in the name of the Vendor and was not subject to overriding interests.
 - iii. That the property was to be sold with vacant possession upon completion and payment of the full purchase price.
 - iv. That the Vendor undertook to indemnify him for any loss suffered in case of breach.
- d. The 4th Defendant averred that he had paid the purchase price between 24th September and 24th October 2015.
- e. He testified that he had registered the transfer after receipt of the transfer forms and completion documents, and had since become the registered and bona fide owner of Plot No. 1360.
- f. He stated that he had taken possession of the property and had been meeting all outgoings in respect thereof.
- g. He contended that the Plaintiff's attempt to cancel his title was appalling and would lead to loss and damage.
- h. The 4th Defendant relied on the following particulars of loss and damage as: -

- i. Purchase price of Kshs. 7,000,000.
 - ii. Stamp duty of Kshs. 140,000.
 - iii. Legal fees of Kshs. 206,480.
 - iv. Travelling expenses.
- i. The 4th Defendant averred that if the title were cancelled, the 1st Defendant ought to indemnify him for the losses incurred.
 - j. The 4th Defendant stated that there was no other pending suit over the same subject matter and admitted the jurisdiction of the Court.

85. The 4th Defendant prayed that if the title was cancelled: -

- a. The Defendant in the Counter - Claim (the 1st Defendant) do reimburse the purchase price of Kenya Shillings Seven Million (Kshs. 7,000,000/-) to the Plaintiff in the Counter - Claim.***
- b. Interest on the above sum from the date of remittance until payment in full.***
- c. Special damages totaling to Kenya Shillings Three Hundred and Forty - Seven Thousand Two Hundred and Eighty (Kshs. 347,280/-) as tabulated in paragraph 24.***
- d. General damages***
- e. Costs of the suit***
- f. Any other relief this Court may deem fit to grant***

86. The 4th Defendant testified as DW - 3 on 25th March, 2025 but before that his counsel on record had the following remarks: -

A. Opening remarks by M/s. Warihiu Advocate.

87. The Learned Counsel for the 4th Defendant submitted that their client had purchased the parcel of land from the 1st Defendant in 2015. The Counsel stated that the 1st Defendant's wife was challenging the purchaser based on succession. It was argued that, like the other Defendants, the 4th Defendant had purchased the land as an innocent purchaser for value without notice.
88. The Counsel emphasized that the 4th Defendant had been a bona fide innocent purchaser for value, as there had been no notice of any claim or fraud at the time of purchase.
89. Counsel further submitted that the Judgment declaring the property matrimonial had been delivered after the transfer of the land had already been undertaken. It was contended that the Plaintiff had gone to the succession court and misled the court. She was now claiming beneficial ownership of all the sub - divisions of the suit land.

B. Examination in Chief of DW - 3 by M/s. Warihui Advocate.

90. DW - 3 was sworn and he testified in English language. He was called DESMOND PATRICK MAINA MUTHEMBA, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing of this case. He resided in

Kileleshwa, Nairobi, and was a businessman engaged in real estate. He stated that on 12th April 2023 he had recorded a witness statement, which he wished to adopt as part of his evidence. He further testified that he had filed a list of documents dated 20th May 2024, comprising eight documents.

91. He explained that on 24th September 2015 he had entered into a Sale Agreement with the 1st Defendant. He stated that he had visited the land and seen the beacon, and that he had conducted due diligence upon learning that the property had been subdivided. He testified that during the due diligence process, he had gathered that one of the parcels was occupied by the 1st Defendant's wife and that she had been a beneficial owner of one of the parcels.

92. DW - 3 stated that the 1st Defendant had only shared with him documents relating to the sub - division, including the application for subdivision. He testified that he had taken possession of the property as soon as the title had been registered in his name, and that he had not been aware of any court proceedings at the time. He explained that immediately upon taking possession, he had constructed a fence and levelled the ground. He stated that he had later become aware of the Plaintiff's claim. He emphasized that

since the year 2015 he had not encountered any court order affecting the property.

93. DW - 3 prayed that he be confirmed as the owner of the property, asserting that he had been an innocent purchaser for value for the past eight years. He testified that the Plaintiff had been his neighbour on the land during that period, and that she had never challenged his ownership or his presence on the property.

C. Cross examination of DW - 3 by Mr. Mungai Kamau Advocate.

94. DW - 3 testified that after purchasing the land, he had taken physical possession by fencing it. He stated that there had been no objection by the Plaintiff that the property he was fencing had been matrimonial property. He explained that he did not know the details of the other properties or their owners, but observed that they too had been fenced. He confirmed that he had been aware of the sub - division documents relating to the subject property.

95. DW - 3 testified that he had seen the court order from the matrimonial proceedings and the Judgment from the family court. In his opinion, the family court had not been aware of the sub - division. He stated that he was not aware of any appeal or review of

the orders of the Judgment by the court. He added that, in his view, he was not expected to be aware of the proceedings between the Plaintiff and the 1st Defendant, and that he would not have known of them. He concluded that the Judgment had been based on misrepresentation of facts.

D. Cross - Examination of DW - 3 by Mr. Ndambuki Advocate.

96. DW - 3 was referred to page 27 of the Plaintiff's documents, being the Judgment of 8th February 2016 in Family Court Case No. 1088 of 2006 / HCCC No. 3 of 2014 (OS). He confirmed that one of the prayers sought by the Plaintiff had been a declaration that the suit property be matrimonial, and that at Paragraph 21 of the Judgment the Court had indeed declared the suit property matrimonial. He acknowledged that the suit had been filed in 2006 and Judgment delivered in the year 2016, whereas he had purchased the property in the year 2015, during the pendency of the court proceedings.

97. DW - 3 testified that he was a real estate businessman with experience, and that before purchasing property he was required to undertake due diligence, including checking for encumbrances, conducting official searches, physically visiting the land, and interviewing neighbours. He admitted that in this case there had

been no neighbours to interview, and that he had only come to know of the Plaintiff after the current proceedings were filed.

98. DW - 3 stated that at the time of purchase there had been no encumbrances or court orders, and hence he had proceeded to register the title. He emphasized that the proceedings had not concerned the sub - division of Kwale/Diani Beach Block/1360. He admitted that he had never visited the Kwale Land Registry to establish whether there were pending court proceedings.

99. DW - 3 was referred to the application for registration dated 25th February 2016, which had been based on the decree of 8th February 2016 in HCCC No. 3 of 2014 (OS). He noted that on the left-hand corner of the application, the Land Registrar had indicated as follows that:- ***“he was unable to register the decree because the parcel had already been subdivided into Nos. 1361, 1362, 1359 and 1360 on 21st June 2012”.***

100. DW - 3 testified that he had filed a Counter - Claim, praying that the 1st Defendant refund him the purchase price of a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=), since he had not been aware of the matrimonial cause. He stated that he had demanded to be reimbursed, but added that even if he were paid, he would still not be willing to abandon the land.

E. Re - examination of DW - 3 by M/s. Waruhiu Advocate.

101. DW - 3 testified that he had not been expected to visit all courts in the course of conducting due diligence. He stated that he had completed the sale in the year 2015, whereas the judgment had been delivered in 2016. He referred to a letter from the District Surveyor dated 3rd September 2002, which indicated that Plot No. 172 had been subdivided into five parcels, namely 1358, 1359, 1360, 1361 and 1362. He emphasized that for nine years the Plaintiff had watched him occupy and develop the property without raising any objection. He testified that he had been paying rates to the County Council without interference and that he had never been joined in the court proceedings.

102. The 4th Defendant marked his case closed through his counsel on record M/s. Waruhiu Advocate on 25th March, 2025.

VIII. Submissions

19. On 25th March, 2025, immediately after the closure of the Plaintiff's case, the Honorable Court directed the Plaintiff to file a plaint dated 28th March, 2017

and the Counter - claim dated 8th February, 2024 be canvassed through written submissions.

20. Subsequently, all parties complied. Pursuant to which the Honorable Court reserved a date for delivery of Judgement on notice accordingly on 1st December, 2025.

A. The Written Submissions of the Plaintiff

21. The Plaintiff through the Law firm of Messrs. Cootow & Associates Advocates filed their written submissions dated 5th August, 2025. Mr. Wafula Advocate commenced his submissions by providing the Honourable Court with the brief facts of this case. The Learned Counsel stated that the Plaintiff herein and the 1st Defendant were involved in before the High Court in the civil case "**HCCC No. 1088 of 2006 - Patricia Musungu Shaaban - Versus - Mohammed Shaaban**" in which the Plaintiff claimed her share in various matrimonial properties including the property known as Kwale/Diani Beach Block/172.

22. The said suit was later consolidated with another suit namely HCCC 165 of 2012 (formerly SRMCC No. 159 of 2006) between the same parties in which suit the Plaintiff sought divorce as against the 1st Defendant. The consolidation resulted in HCCC No. 3 of 2014 which

was fully heard by the High Court (Justice Mugure Thande) and the High Court delivered its Judgement on 8th February, 2016 settling the dispute between the Plaintiff and the 1st Defendant over Kwale/Diani Beach Block/172. The Judgement was produced as Plaintiff Exhibit No. 1).

23. The Learned Judge stated as follows at paragraph 21(b) of the Judgement:-

“The property known as Title No. Kwale/Diani Beach /Block 172 be and is hereby declared to be matrimonial property and the same is to be divided equally between the Applicant (The Plaintiff) and the Respondent (1st Defendant).”

24. The Learned Counsel submitted that none of the parties herein had sought to vary or set aside the Judgement of the High Court. The Judgement was also not appealed and it was binding to the Plaintiff, the 1st Defendant and all Defendants who derive any benefit from the 1st Defendant. The Plaintiff extracted the decree in HCCC No.3 of 2014. However, upon presentation of it at the Kwale Land Registry, the Land Registry declined to enforce the decree on the ground that the 1st Defendant had sub - divided the property and purported to transfer some portions to the 2nd, 3rd, 4th and 5th Defendants.

25. It was important for the Court to note that the 1st Defendant in the said sale and transfer, intended to defeat the Plaintiff's claim and

the decree of the High Court since the sale was done during the pendency of the suit before the High Court. From the above documents filed herein, it was absolutely clear that there were final orders issued by the High Court (Thande J.) in HCCC No. 3 of 2014 (formerly HCC No. 1088 of 2006 (OS). The said Judgement had neither been appealed nor set aside. So, it was valid and enforceable. This Honourable Court had no jurisdiction to review or set aside the order or decree issued in HCCC No. 3 of 2014. The provision of Article 165 (6) of the Constitution was clear that this Honourable Court lacks jurisdiction to supervise or review the decisions of superior courts like the High Court.

26. The Learned Counsel relied on the decision of the Supreme Court of Kenya in the case of:- ***“Kenya Hotels Properties Limited - Versus - the Attorney General & 5 Others (Petition No. 16 of 2020) [2022] KESC 62 (KLR)”*** set a significant precedent in paragraph 47 as follows:-

“147] The High Court however noted that such supervisory power is only limited to a jurisdiction over the sub - ordinate courts but not over a superior court. It opined in that context as follows:

“46.Turning to the facts of this petition, the judgment sought to be annulled is by the Court of Appeal. It is therefore not in dispute that the impugned judgment is by a court superior to this court in terms of judicial hierarchy. It is a judgment binding on this court in terms of precedent. From the

jurisdictional perspective of Article 165 of the constitution, this court has wide jurisdiction which is exhaustively provided for by the constitution. However, the constitution itself places a constitutional caveat that this court cannot supervise other superior courts.

47. Article 165 (6) states in plain language that this court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial junction but not over a superior court. Superior courts in terms of Article 162 (1) of the constitution are the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court. The edict in Article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending other superior courts.

48. Based on the above analysis, can this court answer the petitioner's grievance in the affirmative and annul a decision of the Court of Appeal taking into account the pecking order of the superior courts in this country? And can this court issue an edict to the Court of Appeal directing that court to reopen a closed appeal and hear it de novo? My answer to the above questions must be in the negative. If what the Petitioner asks of this court were to happen, it would certainly amount to undermining the authority of the Court of Appeal by another superior court but inferior to it. It would be against clear words of Article 165 (6)."

27. The Learned Counsel submitted that if the High Court has no jurisdiction to review decisions of other superior courts, this Honourable Court also lacks jurisdiction to review the decision of the

High Court. In the circumstances, all decisions issued by the High Court are valid and enforceable unless the same are varied and or set aside by the Court of Appeal.

28. The Supreme Court in the case of:- ***“Kenya Hotels Properties Limited (Supra)”*** concluded in paragraph 55 of the Judgment as follows;

“[55] We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves. Again, we take cognizance of our finding in the Samuel Kamau Macharia Case where we held that:

“A Court jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any

proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.” (emphasis supplied)

29. According to the Learned Counsel, it was important to point out that the Plaintiff filed an application before the High Court for cancellation of the Defendants’ titles in execution of the High Court but the High Court directed that considering this is an issue dealing with land, be referred to the Environment and Land Court. That was why this matter was before this Honourable Court. Having stated that the Plaintiff filed its case before the High Court in the year 2006, the evidence tendered by all the Defendants was that they purchased the portions of the suit property between the years 2012 and 2014. That meant that Defendants purchased their respective portions when the Plaintiff's suit before the High Court was pending.
30. It was their submission that the purchase and transfer to the Defendants in the year 2012 was an affront to the doctrine of ***lis pendens. The purpose of the doctrine of lis pendens is to preserve the suit property until the suit is finally determined or until the Court issues orders and gives terms on how the suit property should be dealt***

with. The doctrine of lis pendens is founded on public policy and equity.

31. The doctrine of lis pendens provides that no property should be transferred while an action relating to it is pending before court of law. The doctrine aims at preserving the suit property until the court issues directions on how the property should be dealt with.
32. The court in the case of:- **“Abdalla Omar Nabhan - Versus - Executor of the Estate of Saad Bin Abdalla Bin Aboud & 2 others [2013] KEELC 104 (KLR)”** stated that the purposes of the principle of *lis pendens* was to preserve the suit property until the suit was finally determined or until the court issues orders and gave terms on how the suit property should be dealt with. The doctrine of *lis pendens* was founded on public policy and equity.
33. In the case of:- **“Manwji - Versus - U.S. International University and Another (1976-80) KLR 229”** Justice Madan, while addressing the purpose of the principle of *lis pendens* adopted the finding in the case of:- **“Bellamy - Versus - Sabine (1857) 1 De J 566,584”** where Turner L J held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were

permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings."

34. In the same case, Cranworth L J observed as follows:

"Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were so, there could be no certainty that the proceedings would ever end..."

35. Angote J in the case of:-***"Carol Silcock - Versus - Kassim Sharrif Mohamed [2013] KEELC 137 (KLR)"*** quoting Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579 state as follows:

"Every man is presumed to be attentive to what passes to the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendete lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchase in the same manner as if he had such notice, and he will be accordingly be bound, by the judgment or decree in the suit."

36. Based on the fact that the issue of land was tried in HCCC No.3 of 2014 (formerly HCCC 1088 of 2006) and as final binding decision rendered which decision was yet to be appealed, further considering that the 1st Defendant and all those who claim under him are bound

by the decision of the court and considering that the 1st Defendant fraudulently purported to sell the land to the 2nd, 3rd, 4th and 5th Defendants during the pendency of the suit over the said property. They humbly submitted that the transfer was illegal, null and void.

37. With regard to the Defendants who purchased from the 1st Defendant, Angote J in ***“Abdalla Omar Nabhan - Versus - Executor of the Estate of Saad Bin Abdalla Bin Aboud & 2 others [2013] KEELC 104 (KLR)”*** held as follows:-

“In the absence of an injunctive order, a party may dispose of a property to a third party but the final Judgment or order of the court shall issue as though such a sale or transfer never took place and the judgment shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.....A party who purchases a property and invests in it while a suit is pending, does so at his own risk notwithstanding the absence of an injunctive order duly registered against the title.”

38. The Learned Counsel submitted that the 1st Defendant purported to sell the property to defeat the Plaintiff's right to the property. Clearly, the judgement of Justice Mugure Thande in HCCC No.3 of 2013 shows that the Plaintiff is entitled to half share of Plot No. Kwale/Diani Beach/Block 172. The 1st Defendant having sold some

portions during the pendency of the suit before the High Court, the purchase is subject to the judgement. The purchasers can only claim the 1st Defendant's portion after equal subdivision of the suit property in two equal portions.

39. It was further important to note that the Plaintiff was not claiming the entire property. The Plaintiff was only claiming one half of the property being her share. The 1st Defendant purported to state that in the year 2002 he caused the suit property to be sub - divided into various plots. If indeed this was the case, the 1st Defendant should have pleaded so and testified so before the High Court when the High Court was dealing with the question of Kwale/Diani Beach/Block 172. Litigation could not be done in installments. In fact, the 1st Defendant presented to the High Court that the only matrimonial property was Kwale/Diani Beach/Block 172 and that was the reason the High Court declared that the property was matrimonial. That position could not change now after the judgement of the High Court.

40. The Learned Counsel submitted that a lot had been placed by the 1st Defendant on the letter dated 6th April, 2011. The said letter confirmed that as of 6th April, 2011, the Kwale Land Registry still

reflected the existence of property known as Kwale/Diani Beach/Block 172 and that the said property was still registered in the name of the 1st Defendant. Any other issue of the alleged sub-divisions raised by the said letter was inadmissible hearsay.

41. The Court in the case of:- ***“Kenya Commercial Bank Limited - Versus - Thomas Wandera Oyalo [2005]KEHC 3161 (KLR)”*** defined hearsay as follows:-

“A testimony that is given by a witness who relates not what he or she knows personally but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence.”

42. Further the Learned Counsel submitted that Section 63 of the Evidence Act imposes on this Court a duty to rely only on direct evidence in adjudicating disputes. Visram J. (as he was then) in the case of:- ***“Prime Bank Limited - Versus - Esige [2005] KEHC 3183 (KLR)”*** citing the English case of ***“Subramanian - Versus - Public Prosecutor (1956) 1 WLR”*** stated as follows on hearsay evidence.

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and inadmissible when it is proposed to establish by the

evidence not the truth of the statement, but the fact that it was made.” (Underlining is mine)

43. Therefore, if the letter dated 6th April 2011 was meant to establish the truth that the property was sub - divided, then it is inadmissible hearsay. In addition, the letter dated 6th April, 2011 was not proved as required by law.

44. The Learned Counsel further relied on the Court of Appeal decision in ***“Kenneth Nyaga Mwingi - Versus - Austin Kiguta & 2 Others (2015) eKLR”*** comprehensively dealt with the question of proof of documents at Paragraphs 18-22 of the decision. The Court of Appeal was emphatic that mere admission of a document in evidence as an exhibit should not be confused with proof. The Court stated as follows:-

“18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof admission of a document in evidence as an exhibit should not be

confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents-this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”(Emphasis added)

45. According to the Learned Counsel all the Plaintiff was asking was to have her half share of Kwale/Diani Beach/Block 172 as ordered by the High Court. All the other Defendants could settle on the 1st Defendant’s half share.
46. In conclusion they prayed that Judgement be entered for the Plaintiff as prayed in the Plaint. The Plaintiff prayed for costs of the suit too.

B. The Written Submissions by the 2nd and 3rd Defendants

47. The 2nd and 3rd Defendant through the firm of Messrs. Mungai Kamau & Co. Advocates filed their written submissions dated 12th September, 2025. Mr. Kamau Advocate commenced his submissions by stating that the Plaintiff filed the suit herein vide Plaint dated 28th March 2017 seeking, inter alia, declarations that the subdivision of Kwale/Diani Beach Block/172 into plots 1359-1362 was illegal, null

and void, and further seeking cancellation of titles and reinstatement of the original parcel. The Learned Counsel submitted that the Defendants filed a Joint Statement of Defence dated 19th June 2017 opposing the suit and relied on their List of Documents dated 19th June 2017. Other Defendants also filed their respective defences opposing the suit.

48. The Learned Counsel submitted that the Plaintiff had earlier filed suit against the 1st Defendant in 2006, later transferred to Mombasa, and vide Amended Originating Summons dated 29th November 2012 sought a declaration that Kwale/Diani Beach Block/172 was matrimonial property to be shared equally. The Family Court allowed the orders as prayed. The Plaintiff, during cross-examination, confirmed that Block 172 was not in existence during the pendency of the Family Court proceedings, having been sub - divided in the year 2002, and that she resides in the matrimonial house situated on one of the subdivisions.

49. The Learned Counsel submitted that the 2nd and 3rd Defendants produced evidence showing they are joint registered owners of Kwale/Diani Beach Block/1359, measuring 0.2069 Ha, acquired through an agreement for sale dated 6th January 2012 and a

Certificate of Lease dated 30th April 2012. The Learned Counsel submitted that at the time of acquisition, the Land Registration Act 2012 had not been enacted, and therefore spousal consent was not a legal requirement. The subdivision of Block 172 had been effected in 2002, and the registry index map amended accordingly, years before any Family Court proceedings.

50. The Learned Counsel relied on the following four (4) issues for determination. Firstly, on whether the judgment dated 8th February 2016 was per incuriam. The Learned Counsel submitted that the Judgment of the Family Court was rendered per incuriam, having been made in ignorance of both the law and the facts. Ownership of the subject property ought to have been proved before the Court issued its decision. The Amended Originating Summons was filed on 29th November 2012, yet the Applicant produced a Certificate of Lease in the name of the 1st Defendant dated 7th December 2001. The Trial Court ought to have ascertained the current status of ownership of the subject property before making its decision in 2016, fifteen years later, and not assumed that the property was still in the name of the Plaintiff.

51. The Plaintiff intentionally failed to disclose to the Family Court that the subject property had ceased to exist after subdivision and sale, and that transfers had already been effected to the Defendants, including those who are her neighbours. The Defendants stated that they took physical possession and fenced the property after acquiring registration, a fact the Plaintiff knew or ought to have known at the time of filing the Amended Originating Summons in 2012. She failed to notify the Trial Court or amend her pleadings accordingly.

52. The Learned Counsel argued that the decision of the Family Court could have been different, since it issued orders on facts which were obviously wrong and incapable of enforcement. This explains why the Land Registrar was unable to register the said order.

53. Secondly, on whether the Environment and Land Court has jurisdiction to enforce the orders of the Family Court. The Learned Counsel opined that jurisdiction can be raised at any stage of the suit, even on appeal. Though the Defendants admitted jurisdiction in their joint defence, nothing stops the issue being raised now, since jurisdiction is everything. The Plaintiff is seeking enforcement of Family Court orders through this Court, which is of equal status to

the High Court. In effect, she seeks a declaration that the resultant subdivisions of Kwale/Diani Beach Block/172 are matrimonial property, and that the Land Registrar reinstate the original green card pursuant to the decree dated 19th February 2019.

54. The provision of Section 17 of the Matrimonial Property Act provides for the jurisdiction of the requisite Court and the procedure to be adopted. The provision of Article 162 (2)(b) of the Constitution establishes the Environment and Land Court, clothed with jurisdiction to hear disputes relating to title and land. Section 13 of the Environment and Land Court Act further defines its jurisdiction.
55. However, Section 17 of the Matrimonial Property Act specifically provides for applications relating to contested matrimonial property to be made in the High Court. The Supreme Court in ***“Samuel Kamau Macharia & Another - Versus - Kenya Commercial Bank & 2 Others [2012] eKLR”*** held that jurisdiction flows from the Constitution or legislation, and a court cannot arrogate to itself jurisdiction.
56. The issue of jurisdiction can be raised at any stage of the proceedings i.e., after judgment or even on appeal as was held in the Court of Appeal in the case of ***“National Social Security Fund***

Board of Trustees - Versus - Kenya Tea Growers Association & 14 Others” where the Court held at paragraph 21:-

“Jurisdiction can be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time...”**In the case of Jennifer Akinyi Osodo - Versus - Boniface Okumu Osodo & 3 Others [2020] KEELC 1555 (KLR), the Court was faced with a similar case, and the Court held at paragraph 22, “although the Environment & Land Court is equal in status to the High Court, their jurisdictions have been clearly distinguished as such a matrimonial cause fall within the ambit of the High Court.”**

57. According to the Learned Counsel what the Plaintiff has filed before this Court are orders arising out matrimonial proceedings that have been cosmetically been camouflaged as a land dispute and seeking the enforcement orders of this Court whereas the provisions of Section 17 the Matrimonial Properties Act can be executed by the same Court that issued the orders without the intervention of this Court since that court seized off the requisite powers to enforce its own orders.

58. Thirdly, on whether the doctrine of *lis pendens* can apply in the suit herein. The learned Counsel submitted that the *lis pendens* which is a common law doctrine that is provided for under ELC practice directions 2014 and was earlier provided for under Section 52 of the repealed Indian Transfer of Property Act 1882 that in a contentious

suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding to affect the rights of any other party to the suit or proceeding to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. This doctrine has been adopted by our Courts and forms part of our laws by virtue of the provision of Section 3 (1) of the Judicature Act, Cap. 8 and Section 107 (1) of the Land Registration Act which provides for the saving and transitional provisions of the Act and states as follows:-

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

59. The proceedings in the High Court were in respect of KWALE/DIANI BEACH BLOCK/172. The 1st Defendant, in his evidence, produced exhibits confirming that the said property was subdivided in the year 2002, and the Registry Index Map was amended accordingly,

and it was therefore not in existence during the pendency of the proceedings in the High Court. Therefore, the doctrine of *lis pendens* cannot come to the aid of the Plaintiff as submitted, since the subject matter of the High Court proceedings was non-existent.

60. The Learned Counsel submitted that the Defendants herein, though they are expected to know of the pending legal proceedings affecting their property within their area, as submitted by the Plaintiff, there were no legal proceedings against all that the parcel of land registered as KWALE/DIANI BEACH BLOCK/1359, which is registered in their names. In the case of ***“Mawji - Versus - US International University & another [1976] KLR 185”***, the Court held:

“ every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, a purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of facts affects the purchaser.”

61. The property registered in the names of the Defendants herein has never been directly and specifically in question in the proceedings in the High Court, and therefore, the doctrine of *lis pendens* cannot apply in the circumstances.

62. Finally, on whether the Plaintiff has pleaded and proved grounds for cancellation of the Defendant’s certificate of lease dated 30th April,

2012. The Learned Counsel posited that the Plaintiff herein seeks a declaration that the transfer and subdivision of the Defendants' Certificates of Lease be declared to have been illegal, null and void, and the same to be revoked, and the land register for the mother property before sub - division be reinstated. He relied on the provision of Section 26 (1) of the Land Registration Act, No. 3 of 2012. The provision of Section 107 of the Evidence Act provides that:-

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts.

63. It is a trite law that parties are always bound by their pleadings. This position was stated in the case of ***“Independent Electoral and Boundaries Commission & another - Versus - Stephen Mutinda Mule & 3 others [2014] eKLR”***, which cited the decision of the Malawi Supreme Court of Appeal in ***“Malawi Railways Limited - Versus - Nyasulu [1998] MWSC 3”***, in which the Learned Judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] “Current Legal Problems”, at P174, where the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is

bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such an event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings, and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specifically mentioned may be raised without notice."

64. According to the Learned Counsel it was therefore trite law that any allegations of fraud must be specifically pleaded and strictly proved before a certificate of title can be revoked. The Learned Counsel relied on the case of ***"Kuria Kiarie & 2 Others - Versus - Sammy Magera [2018] eKLR"***, where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA(as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

65. The Plaintiff herein, despite seeing nullification and cancellation of the Defendants’ titles as a result of an illegal sub - division, has not specifically pleaded any grounds for nullification of their titles as provided for under the provision of Section 26 of the Land Registration Act. The subdivision of the properties was done in the year 2002, as confirmed by the Director of Surveys in exhibits No. 2, 3 and 4. The Government Officer in charge of sub - division, who had confirmed the subdivisions were lawful and procedurally done, the Plaintiff ought to have adduced evidence to the contrary. The documents were produced as exhibits by consent of the parties, and the Plaintiff did not object to their production; and she cannot challenge those documents as being exhibits before the Court through submissions.

66. The Defendants acquired registration herein on 30th April 2012, before the enactment of the Land Registration Act, which came into operation on 2nd May 2012. Before the Act, there was no mandatory requirement for spousal consent on matrimonial property. This notwithstanding, the property registered in the names of the Defendants herein was not declared matrimonial property, and there was no overriding interest in the property even under the previous legal regime.

67. A party is bound by its own pleadings. This position was opined by the learned Judge A.K. Kaniaru in his ruling in the case of:- ***“Munyi & 77 others - Versus - Gekara Group Ranch through Hebert Nthiri & 343 others (Petition 7 of 2018) [2023] KEELC 18909 (eKLR)”*** at paragraphs 25 - 27, where he stated as follows:-

“It is now crunch time, and I must proceed to make a decision. The Respondents raised the issue as to whether the subject matter - meaning the land parcels in dispute - is valid or existent. The submission was that the parcels of land no longer exist. In the Respondent’s response to the application, and in their submissions too, it was made clear that when this court declared this matter Res Judicata in relation to ELC No 224 of 2015, the Judgment in ELC No 224 of 2015 was implemented. In that regard, the Land’s office revoked titles of land parcels Nos Mbeti/Gachuriri/426 to 4490, and the entire land reverted to its original title Mbeti/Gachuriri/172. The title is for the Gekara clan A

copy of the green card (marked as annexure "BM-I") was made available to the court showing that these changes were effected on November 11, 2022. The application under consideration was filed on December 19, 2022 and is dated December 16, 2022. Quite clearly, by the time the application herein was filed, the above changes had already taken place. It stands to reason that the changes made could not have taken place without first removing the orders of inhibition placed on the land register. Yet the applicants decided to proceed with the application even after being furnished with this clear evidence by the respondents. One would have thought that if the applicant's position was that the orders were still on the land register, then they should have sought leave of court to file a supplementary affidavit or response showing clearly that the orders still existed. To me, it was a clear lack of tact and a manifestation of poor legal stratagem for the applicants to fail to respond to this clear evidence. Their choice of proceeding with the application in the face of such evidence was akin to trying to flog a dead horse or attempting to rein in a horse that had already bolted out of the stables. I therefore agree with the Respondent that the subject matter no longer exists, at least based on what has been made available before the court. It is a trite law that a court of law does not make orders in vain. The applicant had the duty to show that the subject matter exists and/or that the orders of inhibition are still on the land register. They failed to do so".

68. Furthermore, this Court is inclined to give orders as per the prayers sought, as it is trite law that a party is bound by their own pleadings, as it was reiterated in the case of:- **"Independent Electoral**

and Boundaries Commission & Another - Versus - Stephen Mutinda Mule & 3 Others [2014] eKLR", where it was held:

"It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings, goes to no issue and must be disregarded."

69. In conclusion, the Learned Counsel submitted that this Court does not have jurisdiction to enforce the orders of a court of equal status, which court can execute its own orders. The above notwithstanding, the orders of the High Court are incapable of enforcement since the subject matter of the decree does not exist since the Plaintiff intentionally withheld and failed to make full disclosure to the said Court that the subject matter she was claiming was nonexistent after the sub - division even prior to the filling of the proceedings in that court and had changed ownership and the resultant sub - divisions were never the subject matter of those proceedings therefore the doctrine of *is pendens* does not apply to any of them.

70. The Plaintiff cannot benefit from her own laches, and she ought to have moved the High Court accordingly when she was unable to enforce the orders of that High Court. The Land Registrar rejected

the booking form and registration of the decree of the High Court, rightly, since the orders of the High Court were incapable of being enforced. Without prejudice to the foregoing, and the Court is inclined to allow the suit herein above, the Court should take cognisance of the fact that the plaintiff admitted in her oral evidence that she resides in the matrimonial home that is situated on one of the subdivisions, which none of the defendants is claiming ownership. The Plaintiff has failed to prove her case to warrant the orders being sought to be granted in her favour, and they prayed that the suit herein be dismissed with costs.

D. The Written Submissions by the 4th Defendant

71. The 4th Defendant through the Law firm of Messrs. Waruhiu & Co. Advocates filed their written submissions dated 13th November, 2025. M/s. Waruhiu Advocate commenced the submissions by stating that the suit before the Court had been commenced by the Plaintiff dated 28th March 2017. The Plaintiff had been the former spouse of the 1st Defendant. The Plaintiff's case in a nutshell had been that the suit property known as Kwale/Diani Beach/Block 172 ("Mother Title") had been declared matrimonial property and had been fraudulently transferred to the 4th Defendant and the other

defendants unlawfully. The Plaintiff had demanded a share of the suit property and sought to vacate the Defendants. She had also sought cancellation of the entries transferring the property to the Defendants, including the 4th Defendant, and wanted herself declared the legitimate owner.

72. The Plaintiff had sued the Defendants seeking for the aforesaid prayers. The 4th Defendant had filed a Defence and Counter - Claim against the 1st Defendant dated 8th February 2024. His position had been that Kwale/Diani Beach/Block 1360, the result of a procedural subdivision in year 2002, had been lawfully sold to him by the 1st Defendant sometime in the year 2015 at the agreed sum of Kenya Shillings Seven Million (Kshs. 7,000,000/-). Without prejudice, in the event that the Court had been minded to allow the Plaintiff's claim, the 4th Defendant had prayed that his Counter - Claim seeking reimbursement of the purchase price of a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=) together with other reliefs be granted.

73. On the undisputed facts, the Learned Counsel relied on the following: -

- a) The 1st Defendant had been the registered proprietor of the parcel of land known as Kwale/Diani Beach/Block 1360 (“Plot 1360”), being one of the subdivisions of the Mother Title on or about 2002 during the subsistence of the marriage between the Plaintiff and the 1st Defendant.
- b) The 1st Defendant had subsequently sold the sub - divisions namely Kwale/Diani Beach/Block 1359, 1360, 1361 and 1362 to various individuals including the 4th Defendant, to whom transfers had subsequently been made.
- c) The 4th Defendant had purchased Plot 1360 for consideration in the sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=), having conducted all due diligence and confirmed that all rates, rent clearances and consents from the relevant authorities had been obtained, including a Transfer of Lease issued on 21st October 2015, Letters of Approval from the Ministry of Lands dated 18th August 2015, and a letter from the Ministry of Lands Survey of Kenya dated 6th April 2011 ascertaining the subdivision of the Mother Title in 2002.

- d) Pursuant to registration of the transfer, the 4th Defendant had enjoyed quiet possession for nine years until he had been notified of the present suit seeking to cancel his title to Plot 1360.
- e) The Plaintiff had not come to Court with clean hands because she had failed to admit that she had been well aware of the subdivision and had occupied one of the five subdivisions as far back as the year 2002, including when the 4th Defendant had taken vacant possession of Plot 1360.
- f) Upon instituting the suit at Mombasa High Court in Civil Suit No. 3 of 2014 (OS), the Plaintiff and her advocates had a duty to notify the Court that the Mother Title had ceased to exist.
- g) In Paragraph 9 of the Plaint dated 28th March 2017, the Plaintiff had denied any knowledge of the plots being sold and had intentionally omitted mentioning the date of the subdivision, with the deliberate intention to mislead the Court.
- h) The Mother Title had no longer been in existence, hence the rule of *lis pendens* had not applied.

- i) The Plaintiff had been divorced at the time of the sale of Plot 1360 to the 4th Defendant, and thus the requirement for spousal consent had not applied.
- j) The Plaintiff had not produced any evidence to the contrary, and the suit had not met the threshold required to revoke, nullify or reverse the subdivision.

74. The Learned Counsel relied on the following six (6) issues for determination. Firstly, on whether the 1st Defendant had been the lawfully registered owner of the suit property at the time of its sale. The Learned Counsel submitted that in the evidence presented by the parties, it had been undisputed that the Mother Title had been registered in the name of the 1st Defendant. There had been no claim that the 1st Defendant had held the property in trust for the Plaintiff or any other person. The 1st Defendant had sub - divided the property in 2002, and the 4th Defendant had produced a Letter of Consent from the Ministry of Lands dated 18th August 2015 and a letter from the Ministry of Lands Survey dated 6th April 2011 confirming the sub - division.

75. By an Agreement dated 24th September 2015 between the 1st Defendant and the 4th Defendant, Plot 1360 had been sold to the 4th

Defendant. This position had been adequately confirmed by the evidence produced, including the Transfer of Lease dated 21st October 2015.

76. Secondly, on whether the 1st Defendant lawfully transferred the suit property to the 4th Defendant. The Learned Counsel submitted that pursuant to the Transfer, the 1st Defendant had lawfully transferred Plot 1360 to the 4th Defendant. There had been a Sale Agreement, and the purchase price being the consideration was given towards the purchase. It was not in dispute that the 1st Defendant was paid the in full consideration for the sale of the sub - divided Plot 1360 and that the payment was made after due diligence was conducted. Thereafter the property was value for stamp duty which was equally paid to the collector. It is trite law and an accepted practice in Kenya that the Collector of Stamp duties is not bound by the amount of purchase price declared by the buyer and seller in any agreement for sale presented to that office. In appropriate cases, the Collector of stamp duties will mandate and authorize a valuation of the subject property for stamp duty purposes.

77. In this case, a valuer from the Lands Office visited the land in question, assessed the property and a value assigned to it. This was

the amount on which the Government of Kenya assessed and demanded payment of stamp duty from the 4th Defendant, and he duly paid it. This payment led to the registration of the transfer and the lawful passing of title of the land to the 4th Defendant. Accordingly, the 4th Defendant fully complied with the law, and his evidence on this issue was never shaken or materially challenged. They therefore humbly prayed that this Honourable Court find that stamp duty was properly and lawfully paid by the 4th Defendant on the transfer of the sub - divided parcel of land. These circumstances lend credit to the impeccable evidence adduced by the 4th Defendant, confirming that all his actions were above board.

78. Thirdly, on whether the 4th Defendant had been a bona fide purchaser for value in respect of Plot No. 1360. The Learned Counsel had submitted that the Mother Title and subsequent subdivisions had been acquired legally, procedurally and through a legitimate scheme. The Black's law dictionary (9th edition) on page 1355 defines a '**bona fide purchaser**' as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's tile: one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

79. The Learned Counsel had submitted that the 4th Defendant had been a bona fide purchaser for value for the following reasons: At the time of purchase, he had established the root of the title and had possessed no evidence to doubt or question it as presented by the 1st Defendant. The Learned Counsel had relied on the Supreme Court case of ***“Dina Management Limited - Versus - County Government of Mombasa & 5 Others (Petition No. E010 of 2021) [2023] KESC 30 (KLR)”*** and ***“Samuel Kamere - Versus -Lands Registrar, Kajjado Civil Appeal No. 28 of 2005 [2015] eKLR”***, which had stated as follows:

“...in order to be considered a bona fide purchaser for value, they had to prove that they had acquired a valid and legal title, secondly, that they had carried out the necessary due diligence to determine the lawful owner from whom they had acquired a legitimate title, and thirdly, that they had paid valuable consideration for the purchase of the suit property...”

80. It had followed therefore that the 4th Defendant had obtained his title legally from the 1st Defendant, as he had not had any notice of defects in the title in hand, and as such he had anchored his right to property under the provision of Article 40 of the Constitution of Kenya.

81. The elements under the doctrine of a bona fide purchaser for value without notice had been succinctly settled by the Supreme Court in the case of:- ***“Sehmi & Another - Versus - Tarabana Company Limited & 5 Others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment)”***, which had been restated as follows:

“58. It is a fundamental principle of the law of property in land that a purchase of a legal estate for value without notice had been an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner or encumbrancer. The onus of proof however had lain upon the person claiming to be a bona fide purchaser. Three main ingredients had been required for a claimant to mount a successful defence based on the doctrine. These had been innocence, purchase for value, and a legal estate.

59. The element of innocence means that the purchaser must act in good faith. His conduct must not raise any doubt as to whether indeed, he did not have any notice or knowledge as to the existence of a rival interest in the suit land. If for example, it comes to light that during the process of purchase, the claimant engaged in conduct that was unconscionable in the eyes of equity, such conduct would weaken his claim of innocence as to the existence of a rival interest. The element of innocence also connotes the exercise of diligence expected of any reasonable purchaser. The claimant must demonstrate that he acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase.

60. In Torino Enterprises Limited - Versus - Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR), this court held that an innocent purchaser for value denotes a purchaser who

exercised due diligence, which would include, but is not limited to, inspecting the suit property...

61. Purchase for value means that consideration in money or money's worth was paid by the claimant in return for the land. The purchaser must actually pay all the money before receiving notice of the existence of the equitable interest over the suit land. Mere execution of the instrument of conveyance of the legal estate before notice is received without payment of money, will not avail to the claimant the defence of innocent purchaser. A person who takes land without giving value in exchange must take it with all its burdens, equitable as well as legal. Even a person who has given value will be bound if before he obtained the land, he knew of the existence of equitable interest.

82. They humbly submitted that based on the foregoing tenets set out by various Courts, the evidence in this case overwhelmingly demonstrates that the sub-division and subsequent purchase by various individuals, including the 4th Defendant were bona fide purchasers for value. In addition, none of the transactions were tainted by any fraud, illegalities and acquisition of titles procedurally noting that they had no notice whatsoever of any equitable interest held by the Plaintiff herein. The Learned Counsel further submitted that the doctrine of bona fide purchasers only protects a party who is without notice of equitable interests and not the legal interests. The distinction between equitable versus legal interests under the doctrine of bona fide purchaser was recently settled by

the Supreme Court in **“Sehmi & another - Versus - Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment)”** as follows:

a. 62. For our purposes, the purchase must be in reference to a legal estate vis a vis an equitable interest in the suit land. In other words, the contending interests must be a legal estate and an equitable interest in the land. Fully stated therefore, the doctrine means that an innocent purchaser of a legal estate in land without notice of an equitable interest in the said land, takes free from the encumbrance of the latter interest. Say for example, x holds land in trust on behalf of y, the legal estate vests in x, while the equitable interest vests in v. Should z purchase the land from x without notice of the trust in favour of v, then he would acquire the land free from the encumbrance of v's interest. Of course the scenario would be different were the contestation be between an equitable interest and a mere equity.

b. 63. The doctrine is a classic example of the time hallowed maxim; “equity follows the law”. And so aptly stated, legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice. It is worth emphasizing that the innocent purchaser doctrine only protects the purchaser against those basing their claims upon an equitable interest in the suit land [see Megarry; The Law of Real Property; 6th Ed Pp 138-150]”

83. The position of the law is therefore set that the 4th Defendant and together with the other purchasers (2nd, 3rd and 5th Defendants) could only claim to have been bona fide purchasers for value

without notice if they had no knowledge of the alleged equitable interest held over the suit property prior to acquiring it.

84. They submitted that the 4th Defendant was not aware of the overriding interest noting that the Plaintiff and the 1st Defendant had already divorced prior to the said purchase as the said interest were not registered on the title to the suit property. Consequently, the purported interest of the Plaintiff over the suit property could never have been known and or disclosed to the 4th Defendant and the other purchasers. A reasonable diligent purchaser could not have identified these ' equitable interests' and known that the suit property was not available for sale until the dispute in the matrimonial cause was settled.

85. Fifthly, on whether there existed any factors that vitiate or compromise the legal title of the land ultimately sold to the 4th Defendant. The Learned Counsel asserted that there was absolutely no scintilla of evidence offered by the Plaintiff or the other Defendants that could serve to vitiate the title in question. The evidence of the witness offered by the 4th Defendant was never materially shaken on cross examination, and it deserved full acceptance with regard to this issue. It should also be noted that

neither the Plaintiff nor any of the Defendants at the hearing produced any documents or adduced any evidence sufficient to support a conclusion that the legal title to the land ultimately sold by the 1st Defendant to the 4th Defendant was in any way suspect.

86. They submitted that the 4th Defendant is the based on as evidence tendered as well as Section 26 of the Land Registration Act, the 4th Defendant is the absolute and indefeasible owner of Kwale/Diani Beach/Block 1360, which title is not subject to challenge as the Plaintiff has failed to produce any evidence to support her claim. The provision of Section 26 of the Land Registration Act, No. 3 of 2012.

87. According to the Learned Counsel, a look at the Plaintiff's list of documents lists only three documents, namely - copy of Judgment dated 8th February 2016, a subsequent order dated 19th February 2016 and a copy of the application form dated 25th February 2016. No evidence was produced to this Honorable court demonstrating that the said title was obtained through fraud or misrepresentation to which the 4th Defendant is proved to be a party nor that the Certificate of Title was been acquired illegally, un-procedurally or through a corrupt scheme. On the contrary, the 4th Defendant

provided evidence that the entire transaction was done legally and procedurally.

88. They relied on the case of:- ***“Kimanji - Versus - Mahira Housing Company Limited & another (Environment and Land Case Civil Suit 618 of 2012) [2025] KEELC 5191 (KLR) (10 July 2025)”*** which had similar circumstances. It was held that: -

73. In the absence of evidence to prove that the Defendants obtained the challenged titles by fraud or mistake as provided under Section 143 of the Registered Land Act or Section 26 of the Land Registration Act, the titles remain valid and unimpeached.

74. Consequently, there is no basis upon which the court can make a finding that the Defendants have interfered with the Plaintiff's proprietary rights in plots 1009 and 1064, or an order for compensation.

75. The Plaintiff has also sought a declaration that the resolution passed under minute no. 15/06 of the 5th November 1986 is null and void. However, beyond merely pleading this relief, the Plaintiff did not lead any substantive evidence in support of this claim. Notably, the actual resolution in question was never produced before the court, nor was any witness called to testify on its contents, context, or effect

89. Lastly, on whether a proprietary interest was created in favour of the 4th Defendant as a result of the doctrine of Estoppel. The Learned Counsel contended that without prejudice, the doctrines of proprietary estoppel and constructive trust apply, which the Plaintiff and the 1st Defendant cannot renege. The 1st Defendant executed

sale and completion documents and received the full purchase price from the 4th Defendant all the while failing to disclose the fact that he was in the process of divorce. The Plaintiff, who lived in one of the subdivided plots adjacent to Kwale/Diani / Beach Block/ 1360, watched the 4th Defendant fence and take possession of his subdivided plot and not once did she communicate the same, register a caveat nor seek injunctive relief. As a result, the actions of the Plaintiff and the 1st Defendant towards the 4th Defendant create a proprietary interest in the suit property.

90. They relied on the Court of Appeal case of:- ***“Maina & 87 others - Versus - Kagiri (Civil Appeal 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR)”*** where it was held that: -

“20. In Yaxley - Versus - Gotts & another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the Respondent who put the Appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The Respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the Respondent cannot renege. As Lord Bridge Page 9 of 14

observed in Llyods Bank Ple - Versus - Rosset, (1991) 1 AC 107,132, a constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the Claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property. Nothing in the Land Control Act prevents the Claimants from relying upon the doctrine of constructive trust created by the facts of the case. The Respondent all along acted on the basis and represented that the Appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman - Versus -Steadman (1976) AC 536, 540, "If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable".

... 29. The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honorable Judge erred in failing to consider that the Appellants were in possession of the suit property, that the Respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land. We do find that the possession and occupation by the Appellants of the suit property is an overriding interest attached to the said property."

91. Regarding whether the doctrine of estoppel is applicable to land, they cited the Court of Appeal case of ***“Willy Kimutai Kitilit - Versus - Michael Kibet [2018] KECA 573 (KLR)”*** which upheld the decision in ***“Maina & 87 others - Versus - Kagiri (Supra)”*** and found that the said doctrine has full effect. It was held:

“[26]... we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

[27] Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow

the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”

92. On whether the doctrine of *lis pendens* applied in this matter. The Learned Counsel asserted that being that Mother Title was subdivided into five (5) sub - divisions namely plot numbers 1359, 1360, 1361, 1362 and 1362 on or about the year 2002, a time when spousal consent was not in effect, and for which consent was given by the requisite authorities. Thence, the Mother title and the subject matter upon which this suit is premised ceased to exist. Not only was this well known to the Plaintiff that at the time of seeking the divorce yet the Plaintiff failed to notify the High Court (HCCC No. 3 of 2014) Matrimonial Cause Court Lady Justice Mugure Thande)) of the following: -

- a) That the sub - division was complete and that this was done whilst she was still married
- b) That she was in possession of one of the sub - divided plots

93. According to the Learned Counsel, the Plaintiff did not ascertain the subject matter of the suit nor conduct a search of the property,

despite it being her duty to do so. Primarily because she was fully aware as she is the 4th Defendant's neighbor. The Plaintiff also did not amend her prayers when it became obvious that the Mother Title had been sub-divided thus the Plaint stands defective as it fails to disclose any reasonable cause of action. They submitted that the present suit should therefore be dismissed with costs to the 4th Defendant.

94. Under this arm they relied on the case of:- ***“Joseph Okumu Simiyu - Versus - East African Building Society another 2005KEHC2360(KLR)”*** where it was found that:

“Indeed going by the plaint I am left with the distinct acceptance of the argument raised on behalf of the defendants. There is no reasonable cause that has been left surviving in view of the transfer of the suit property to a third party who is not a party in this action.”

95. Furthermore, due to the fact of the non-existence of the subject matter as a result of the subdivision of the Mother Title prior to the institution of this suit as well as the prior to the year 2006 an institution of the present suit serve as an automatic stay. They cited the case of ***“Co- operative Bank of Kenya Limited - Versus - Patrick Kangehe Njuguna & 5 others [2017] eKLR”*** in which the Court expressed itself as hereunder:

“54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed Section 52 of the ITPA, an automatic prohibition of dealings or transfers of the property is only during the ‘active prosecution” of the proceedings. Consequently, while the parties are automatically duty bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin.

55. This conclusion is informed by the fact that lis pendens as applied in Kenya is heavily borrowed from the Indian system. However, unlike our system, the Indian one was amended to rid itself of the phrase ‘active prosecution.’ Consequently, in India, lis pendens kicks in from the moment proceedings are instituted, all the way through to the Appellate stage. This has been the position adopted by the Supreme Court of India (see Jagan Singh - Versus - Dhanwanti (2012) 2 SCC 628). Clearly, the Plaintiffs under that system enjoy a wide berth in so far as the doctrine is concerned. To ensure that this new found freedom is not abused by unscrupulous Plaintiffs-who may file frivolous suits in a bid to frustrate a legitimate owner's right to deal in his land, several safeguards were put in place; from levies of compensatory costs in frivolous proceedings, to expedited proceedings and compensatory damages against vexatious plaintiffs (see Vinod Seth - Versus - Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010). In Kenya, however, no such measures have been legislated regarding lis pendens. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in Consequently, the contention that

mere filing of suit operates as an automatic stay of dealings, fails.”

96. The Learned Counsel averred that the mother title as elaborated in this case does not form part of matrimonial property nor does it exist, having been duly sub - divided in the year 2002. The 4th Defendant in particular followed due process in securing ownership and subsequent transfer of Plot 1360, one of the five (5) plots resulting from the subdivisions. The purchase by the 4th Defendant was therefore acquired lawfully as a bona fide purchaser. Furthermore, and without prejudice, the 4th Defendant has a proprietary interest over Plot 1360, as a result of the doctrine of Estoppel, which cannot be reneged.

97. In the upshot, the Learned Counsel urged this court to find the Plaintiff's suit devoid of merit and dismiss the same with costs to the 4th Defendant. However, should the court be minded to allow the suit as prayed for, the 4th Defendant sought that the prayers sought in the Counter - Claim be granted.

IX. Analysis and Determination

98. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the Defendants and the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

99. The provision of Sections 107 (1), 108 & 109 of the Evidence Act, Cap. 80 provides that: -

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

100. Section 108 provides:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

101. And Section 109 provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

102. For the Honourable Court to arrive at a reasonable, fair and Equitable decision, it has crafted five (5) key issues for its determination. These are:-

a) Whether the property known as Kwale/Diani Beach/Block 172 was matrimonial property.

b) Whether the subdivision and transfers to the 2nd - 5th Defendants were lawful.

c) Whether the Defendants were bona fide purchasers for value without notice.

d) Whether the parties are entitled to the reliefs sought.

e) Who should bear the costs of the suit and Counter - Claim.

ISSUE No. a). Whether the property known as Kwale/Diani Beach/Block 172 was matrimonial property.

103. Under this sub - title, the Honourable Court decipheres that the main substratum on this point is the final determination made by the High Court in the earlier matrimonial proceedings between the Plaintiff and the 1st Defendant. I wish to take the litigants back to an extract on the record from a Judgement in the divorce cause:

“The property known as Title No. Kwale/Diani Beach /Block 172 be and is hereby declared to be matrimonial property and the same is to be divided equally between the Applicant (The Plaintiff) and the Respondent (1st Defendant).”

104. The Court notes that there are relevant facts from the record that the High Court delivered that Judgment on 8th February 2016 and a decree was extracted from it. It is imperative to note that the Judgment had not been appealed, set aside or varied according to the pleadings and the court file before this Honourable Court.

105. At this juncture, prior to delving into indepth analysis of the matter, the Honourable Court wishes to extrapolate on a few legal interpretations and definitions on certain relevant terminologies. To

begin with, the Constitution of Kenya, 2010, in Article 45 (1) and (3) states that **“the family”** is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State, and that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

106. Why would the Court be examining as to whether or not one is matrimonial property?. **“Matrimonial Property”** is defined in Section 2 of the Act as follows:-

“means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses and their family home and include any other attached property”.

107. Further, the provision of Section 6 (1) of the Matrimonial Property Act, 2013 defines matrimonial property to include: -

- a. The matrimonial home(s).
- b. Household goods and effects.
- c. Any other property jointly owned and acquired during marriage

108. The provision of Section 6 (1) of the Matrimonial Property Act, 2013 defines matrimonial property to include: -

- a. The matrimonial home(s).

b. Household goods and effects.

c. Any other property jointly owned and acquired during marriage

109. Accordingly, Section 7 of the Act provides for “**ownership of matrimonial property**” which vests in spouses according to contribution and upon dissolution of marriage, it shall be divided between them. Section 12 of the Act restricts disposal of matrimonial property without spousal consent as stated before in this judgment.

110. Under the provision of Section 2 of the Matrimonial Property Act No. 49 of 2013, “**contribution**” is defined to mean both monetary and non-monetary contribution. Non-monetary contribution includes: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work. The provision of Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouse’s contribution to wit: -

Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

111. Whilst, the provision of Section 2 of the Land Laws (Amendment) Act, 2016, No 28 of 2016 which commenced on September 21, 2016 defines **“court”** to mean the Environment and Land Court established by the Environment and Land Court Act, 2011, and other courts. Section 12 of the Matrimonial Property Act, holds that there is need for **“Spousal Consent”**. Prior to the amendment of the provision of Section 93 of the Land Registration Act, No. 3 of 2012 sub - Section (4) of the said section provided that any spouse disposing of an interest in land without consent of the other, that disposition was void. The entire Section 93 of the Land Registration Act 2022 was deleted and it was replaced by a new section which provided as follows:-

112. **“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of marriage, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act”.**

113. The Court further notes that, indeed the suit property known as Kwale/Diani Beach Block 172 prior to its sub - division unilaterally perpetrated by the 1st Defendant, was declared matrimonial property by the Family Division of the High Court in the case of:- **“P M S - Versus - M S [2016] eKLR”**. The Court held that the parcel fell

within the definition of matrimonial property under the Matrimonial Property Act, 2013, and ordered equal division between the spouses. Subsequent Environment and Land Court proceedings (Civil Suit No. 107 of 2017) revolved around whether sub - divisions and transfers to third parties could defeat that matrimonial decree.

114. I have early indicated herein Section 93 of the Land Registration Act, 2012 introduced the requirement of spousal consent for transaction involving matrimonial property and Section 26(1) of the Act on the title being indefeasible unless obtained through fraud or misrepresentation.

115. In Kenya, property owned by a spouse before marriage generally remains their separate property. However, the other spouse may acquire a beneficial interest in it if he/she contributes to its improvement. Prenuptial agreements can also be used to delineate separate and matrimonial property.

116. The Matrimonial Property Act preserves the legal principle of separation of property acquired before or after marriage subject to rules on commingling or improvement by the other spouse. Thus, simply put, if you keep your separately owned property as truly

separate from jointly owned property, then you retain your interest 100% in the said assets.

117. As already indicated, Matrimonial assets are defined to include the family home and goods therein and assets acquired jointly during the marriage. On the other hand, non-matrimonial assets are those acquired separately by a person and his/her spouse before or during the marriage. It is important to note that a spouse may additionally acquire a beneficial interest in separately owned property based on contribution e.g., through improving that asset or through commingling.

118. In interpreting the previously emphasised pertinent provisions of the Matrimonial Property Act, the decision of ***“E N K - Versus - J N K [2015] KEHC 2041 (KLR)”***, which this court hereby adopts, stated as follows: -

“What constitutes Matrimonial Property is stated in Section 6 (1), as read with Section 14 of the Act. It is essentially the property acquired by either spouse during marriage as where the property is acquired jointly, or is registered in the joint names of the parties, the presumption would be that it is to be divided equally between them in the event of divorce. The presumption is rebuttable. Where it is acquired by one spouse or is registered in the name of one spouse, the presumption would be that the one holds the same in trust for the other. The provision in Section

14(a) does not say so, but it is subject to Section 7, so that division of such property will take into account the contribution of either spouse to its acquisition.”

119. I would also like to fully associate myself with the sentiments expressed in case of:- **“Echaria - Versus - Echaria [2007] eKLR (Court of Appeal)”**, where the Honourable Court of Appeal established that contribution (monetary or non-monetary) is the basis for division of matrimonial property. The said decision reinforced that spousal rights cannot be defeated by unilateral dealings of one spouse.

120. It is established law that the burden of proof rests on the party who makes the allegation, in this instance, the plaintiff. She claimed to own immovable property allegedly acquired during the marriage. What documents, therefore, did she present to substantiate her assertions? This Honourable Court further notes that in the case of:- **“P M S - Versus - M S [2016] eKLR (HCCC No. 3 of 2014, formerly Civil Suit No. 1088 of 2006)”**, the High Court (Family Division) declared Kwale/Diani Beach Block 172 matrimonial property. Ordered equal division between Patricia Musungu Shaaban (Plaintiff) and Mohamed Shaaban (Defendant). This judgment was delivered on 8th February 2016. Block 172 was expressly declared matrimonial property in 2016.

121. Accordingly, this Honourable Court finds that Kwale/Diani Beach Block 172 was matrimonial property under Kenyan law, as declared by the Family Court in 2016. The Plaintiff's rights vested upon that declaration. However, subsequent transfers raised a conflict between matrimonial property rights (protected under the Matrimonial Property Act) and third-party purchaser protections (under the Land Registration Act). The Court's task is to balance these competing interests, often leaning on precedents like "**Echaria - Versus - Echaria (Supra)**" and statutory spousal consent provisions.

ISSUE No. B: Whether the sub - division and transfers to the 2nd - 5th Defendants were lawful.

122. Under this sub-title we examine whether the subdivision of Kwale/Diani Beach Block 172 into parcels 1358, 1359, 1360, 1361 and 1362, and the subsequent transfers to the 2nd - 5th Defendants, were lawful in light of statutory provisions and judicial precedent.

123. The provision of Section 6 of the Matrimonial Property Act No. 49 of 2013, the Act provides that: -

"For the purposes of this Act, matrimonial property means— (a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

124. Further, the provision of Section 7 of the Act provides that: -

“Subject to section 6, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

125. Similarly under the provision of Section 12 of the Act, it is provided that: -

“A spouse shall not during the subsistence of a marriage dispose of, alienate or transfer matrimonial property without the consent of the other spouse.”

126. Section 14 of the Act provides that:

Where matrimonial property is acquired during marriage-

(a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b) In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

127. As I earlier indicated in this Judgment, the provision of Section 93(1) of the Land Registration Act provides that: -

“If a spouse obtains land for the co-ownership and use of both spouses or all spouses, the Registrar shall register the spouses as proprietors in common, and no disposition of the land shall be valid without the consent of both spouses.”

128. Further the provision of Section 26 (1) of the Act, provides on the issue of the title that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the

proprietor, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to challenge only on the ground of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

129. I further note that the provision of Section 3 of the Law of Contract Act, Cap. 23 provides that: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded – (a) is in writing; (b) is signed by all the parties thereto; and (c) the signature of each party signing has been attested by a witness who was present when the contract was signed.”

130. While the provision of Section 38 (1) of the Land Act, No. 6 holds that.....

131. I dare note that in **“Echaria - Versus - Echaria [2007] (Supra)”**, the Honourable Court Appeal established the contribution (monetary or non-monetary) as the basis for division of land. This suit property had been declared matrimonial property in the case of:- **“P M S - Versus - M S [2016] eKLR (HCCC No. 3 of 2014)”**.

132. The District Surveyor’s letter of 3rd September, 2002 confirmed subdivision of Plot 172 into five parcels. However, subdivision did not extinguish matrimonial rights if the parent title was matrimonial property. The 2nd - 5th Defendants purchased parcels between 2012

and 2015, during the pendency of matrimonial proceedings (filed in 2006, judgment delivered in 2016). By virtue of Section 93 Land Registration Act (effective May 2012), spousal consent was required for dealings in matrimonial property. The Defendants admitted they did not seek or obtain such consent.

133. I take note that the Defendants rely on Section 26 of the Land Registration Act arguing they were bona fide purchasers for value. However, courts have held that indefeasibility does not protect titles obtained in violation of overriding interests such as matrimonial rights. The Plaintiff argues that transfers were designed to defeat her rights, while Defendants argue they acted before the matrimonial decree. The Court must weigh whether pendency of proceedings gave constructive notice.

134. In that instance I conclude that the subdivision and transfers to the 2nd - 5th Defendants were procedurally regular under land law (sale agreements, registration, issuance of titles), but substantively unlawful under matrimonial property law because:

- a. Plot 172 had been subject to matrimonial proceedings since 2006.

b. Spousal consent was required under Section 93 LRA after 2012.

c. Purchasers failed to conduct full due diligence (no inquiry into pending litigation or spousal rights)

135. Thus, while the Defendants hold registered titles, those titles are impeachable under Section 26 Land Registration Act if proven to have been obtained in violation of overriding matrimonial rights.

ISSUE No. C: Whether the Defendants were bona fide purchasers for value without notice

136. Under this sub-title we examine whether, the 2nd - 5th Defendant who purchased subdivision of KWALE/ DIANI BEACH BLOCK 172, qualify as bona fide purchasers for value without notice under Kenyan Law. On challenging validity of title, Sections 26 (1) (b) of the Land Registration Act states that:

‘The Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge, except -

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

137. In the case of ***“Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others (2015) eKLR”***, the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of ***“Katende - Versus -Haridar & Company Ltd (2008) 2 EA 173”***, the Court defined what amounts to a bona fide purchaser for value thus:

‘A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a Certificate of Title***
- b. He purchased the Property in good faith;***
- c. He has no knowledge of the fraud;***
- d. The vendors had apparent valid title;***
- e. He purchased without notice of any fraud;***
- f. He was not party to any fraud.***

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.’

138. While in the case of ***“Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura - Versus - Attorney General & 4 others (2017) eKLR”***, the Court of Appeal held that a party cannot claim a bona fide purchaser for value where the vendor did not have a valid title.

139. Yet in the case of ***“Munyu Maina - Versus - Hiram Gathiha Maina, Civil Appeal No 239 of 2009”***, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

140. The Defendants conducted searches at the Land Registry, which confirmed the parcels were registered in the name of Mohamed Shaaban. However, they admitted they did not check court records or inquire into spousal consent. Purchases occurred between 2012 and 2015, while matrimonial proceedings filed in 2006 were still pending. The judgment declaring Plot 172 matrimonial property was delivered in 2016.

141. By virtue of Section 93 LRA, spousal consent was required for transactions involving matrimonial property after May 2012. The Defendants did not obtain such consent. Courts have held that pendency of litigation and the existence of a spouse can amount to constructive notice. Purchasers cannot claim innocence if they deliberately avoided inquiry.

142. Courts have held that pendency of litigation and the existence of a spouse can amount to constructive notice. Purchasers cannot claim innocence if they deliberately avoided inquiry.

143. On the issue of the 4th Defendant being that he raised a counter claim as well, he purchased in 2015 while matrimonial proceedings (filed 2006; judgment 2016) were pending. That pendency was discoverable and therefore relevant to notice. No evidence of spousal consent appears on the record; absence of consent engages Section 12 of the Matrimonial Property Act 2013 and Section 93 of the Land Registration Act, 2012 and undermines the lawfulness of the disposition. The 4th Defendant carried out registry searches and physical inspection but admitted not checking court records or the Kwale registry for pending decrees; courts have held such partial searches may amount to inadequate due diligence and constructive notice.

144. The Defendants meet some elements of bona fide purchase (valuable consideration, registered titles, absence of actual fraud), but they fail on notice and due diligence:

- a. They purchased during pending matrimonial proceedings.

b. They did not obtain spousal consent as required by Section 93 Land Registration Act.

c. They ignored constructive notice of matrimonial rights

145. Therefore, the Defendants cannot be deemed bona fide purchasers for value without notice. Their titles, though registered, are impeachable under Section 26 Land Registration Act if proven to have been acquired in violation of overriding matrimonial rights. Further, on the facts as pleaded and admitted, the 4th Defendant's title is vulnerable to impeachment because the disposition lacked spousal consent and occurred during pending matrimonial proceedings that a prudent purchaser should have discovered.

ISSUE No. D: Whether the parties are entitled to the reliefs sought

146. Under this subtitle we apply the law to the facts as found in the record and determine, separately, the Plaintiff's principal reliefs and the Defendants' counter-reliefs. The Plaintiff sought for declaration, cancellation and possession of the suit property.

147. A plaintiff seeking declaration that a parcel is matrimonial property and cancellation of subsequent titles must prove (a) that the parcel formed part of matrimonial property as defined by the Matrimonial Property Act, 2013; (b) that the spouse who dealt with the land did

so in breach of the statutory restrictions (no spousal consent where required); and (c) that the transfers to third parties were effected to defeat the spouse's rights or were tainted by fraud, misrepresentation or illegality that renders the titles impeachable under the provision of Section 26 Land Registration Act, No. 3 of 2012.

148. The Family Court declared Plot No. 172 matrimonial property (judgment 8th February 2016). That declaration established the character of the parent parcel for the purposes of matrimonial protection. Subdivision into numbered parcels (1358-1362) occurred; several transfers followed. The purchasers acquired titles and, in some cases, took possession before the Family Court judgment but during the pendency of matrimonial proceedings (filed 2006; judgment 2016). Section 93 of the Land Registration Act (spousal consent) was in force from 2nd May 2012; purchasers who acquired interests after that date dealing with matrimonial property were required to ensure spousal consent or otherwise risk that the disposition be voidable. The record shows no spousal consent was obtained.

149. Several purchasers admitted they did not investigate pending matrimonial proceedings at the registries or obtain spousal consent; some relied solely on registry searches and the vendor's subdivision documents.

150. In conclusion, on the Plaintiff's reliefs, the Court finds that:-

- a. **On declaration that Plot 172 is matrimonial property:** The Plaintiff is entitled by virtue of the Family Court judgment already made that declaration and the Plaintiff proved the matrimonial character.
- b. **On cancellation or setting aside of transfers obtained to defeat matrimonial rights:** Entitlement depends on proof that the transfers were effected with knowledge of the matrimonial claim, or that they were procured by fraud/misrepresentation or in breach of statutory consent requirements. Where a purchaser bought during the pendency of matrimonial proceedings and failed to make reasonable inquiries, the court may find constructive notice and impeach the title. On the record before the Court, the Plaintiff is entitled to have transfers set aside against those purchasers whose titles were

obtained in breach of spousal consent or by means that defeat the matrimonial decree.

- c. **On possession/delivery of vacant possession:** If a transfer is set aside, the Plaintiff is entitled to restitution of possession of the affected parcel(s). Where a purchaser is innocent and the title is not impeachable, the Plaintiff's remedy may be limited to damages or an order against the vendor.

151. On the reliefs sought by the 2nd to 5th Defendants on the indefeasibility/ bona fide purchaser protection; a registered proprietor ordinarily enjoys indefeasibility of title under the Torrens system (Section 26 of the Land Registration Act). That protection yields where the title was obtained by fraud, misrepresentation, illegality, or where the purchaser had actual or constructive notice of an overriding interest (including matrimonial rights) and therefore cannot claim to be a bona fide purchaser without notice.

152. The 2nd to 5th Defendants produced their sale agreements, paid valuable consideration and obtained certificates of title. Those facts favour indefeasibility. However, several purchasers bought while matrimonial proceedings were pending and admitted they did not check court records or obtain spousal consent. The 4th Defendant in

particular purchased in 2015 during the pendency of the matrimonial suit and later acknowledged seeing the family court judgment only after purchase; he also admitted not visiting the Kwale registry to check for pending decrees.

153. The evidence shows some purchasers carried out partial due diligence (registry searches, physical inspection) but omitted inquiries that a reasonably prudent purchaser would make when a parent parcel is known to have litigation or when subdivision is recent. Failure to make such inquiries can amount to constructive notice.

154. In conclusion, those Defendants who can prove they purchased in good faith, for value, without actual or constructive notice, and whose titles were not procured by fraud or illegality, are entitled to protection under the Torrens system and their titles should not be cancelled and those Defendants who purchased with constructive notice of the matrimonial proceedings or who participated in or benefited from a scheme to defeat the Plaintiff's rights are not entitled to indefeasibility; their titles are impeachable and they are not entitled to retain the parcels which is not the case in this instant claim.

155. On the reliefs sought by the 4th Defendant (counter claim for indemnity/ refund of the purchase price and damages); this Court takes note that a purchaser who is later deprived of title because the vendor's disposition was voidable or fraudulent may claim indemnity from the vendor for the purchase price and consequential losses, provided the purchaser acted in good faith and the vendor is liable for the loss.

156. The 4th Defendant claims to have paid a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=) as consideration for the parcel of land known as Parcel No. 1360 (being part of the sub - division of all that parcel of land known as Kwale/Diani Block No. 172) got registered and was issued with a Certificate of Title. He claims he was unaware of the matrimonial cause and seeks reimbursement if his title is cancelled. He also pleaded special damages (stamp duty, legal fees, travel). In this particular instance, the Court finds that the 4th Defendant's title is impeachable because the transfer was part of a scheme to defeat the Plaintiff, the 4th Defendant therefore is entitled to recover from the 1st Defendant as his title has been set aside; being that he acted in good faith and the vendor being the 1st Defendant herein is liable for the loss.

157. Plot No. 172 was matrimonial property within the meaning of the Matrimonial Property Act, 2013, and the Family Court's declaration of 8th February 2016 established that character. By reason of the matrimonial character of the parent parcel and the statutory regime governing dispositions of matrimonial property, a disposition by one spouse without the consent of the other is in breach of section 12 of the Matrimonial Property Act and may be impeached. Although registration ordinarily confers prima facie indefeasibility under the Torrens system, that protection yields where the title was obtained in breach of overriding interests, by fraud, misrepresentation, illegality, or where the purchaser had actual or constructive notice of such overriding interests.

158. A purchaser who buys during the pendency of litigation affecting the parent parcel and who fails to make reasonable enquiries cannot claim to be a bona fide purchaser without notice. The 4th Defendant's partial searches and failure to check court records amounted to inadequate due diligence and constructive notice. On the facts found, the 4th Defendant's registered title is impeachable for want of spousal consent and because the purchase was made with constructive notice of the matrimonial proceedings.

159. The 4th Defendant purchased during the pendency of matrimonial proceedings and failed to obtain spousal consent or to make reasonable enquiries of court records; those omissions amounted to constructive notice. The Matrimonial Property Act and the Land Registration Act together protect spousal interests and limit the ability of a single spouse to defeat those interests by unilateral dispositions. Equity and the Torrens exceptions require that an innocent purchaser deprived of title by a vendor's wrongful disposition be indemnified by the vendor; accordingly the Court orders repayment by the 1st Defendant to the 4th Defendant subject to proof and mitigation.

160. Having found that the transfer to the 4th Defendant was effected in breach of the Plaintiff's matrimonial rights and that the 4th Defendant had constructive notice, the Court makes the following orders:

a) Declaration - It is declared that Kwale/Diani Beach Block 172 is matrimonial property as between the Plaintiff and the 1st Defendant.

b) Setting aside transfer - The transfer of the parcel identified as Block 172 — Parcel No. 1360 (the parcel purchased by the 4th Defendant) is hereby set aside and the certificate of title issued to the 4th Defendant is cancelled to the extent necessary to give effect to this order.

c) Restitution of possession - The 4th Defendant shall deliver vacant possession of the said parcel to the Plaintiff within 30 days of service of this Judgment. If the 4th Defendant fails to deliver possession within that period, the Plaintiff is at liberty to apply for a writ of possession.

d) Indemnity against the 1st Defendant

- **The 1st Defendant shall repay to the 4th Defendant the sum of Kshs. 7,000,000 being the purchase price paid, together with proven special damages as particularized and proved at trial (including stamp duty and reasonable legal fees), subject to the 4th Defendant proving those sums by documentary evidence.**
- **The 1st Defendant shall pay interest on the principal sum of Kshs. 7,000,000 at the court rate from the date of payment by the 4th Defendant until repayment.**

e) Mitigation and set-off

- **The 1st Defendant is entitled to set off any sums lawfully due to him from the 4th Defendant against the indemnity ordered above. The Court will determine any disputed set-off on application.**

ISSUE No. E: Who should bear the costs of the suit and the Counter claim

161. Under this Honourable Court, we shall examine who should bear the costs of the suit and the counterclaim. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a party is granted at the conclusion of any legal process or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

162. The provision of Section 27 of the Civil Procedure Act, Cap, 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows;-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

163. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book ***Judicial Hints on Civil Procedure, 2nd Edition, 2005*** at 95 notes

that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

164. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of: ***"Morgan Air Cargo Limited - Versus - Everest Enterprises Limited [2014] eKLR"*** the court noted that;

"The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Cost follow the event" was driven by the fact that there could be no "one-size-fit-all" situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

165. In this case, as this Honourable Court has opined above, the Costs in the main suit are awarded to the Plaintiff to be paid by the Defendants severally and jointly. The Plaintiff is also awarded the costs of the Counter - Claim to be paid by the 1st Defendant

only as she participated in it. The Counter - Claim is allowed to the extent set out in the Judgment. Costs of the Counter - Claim are awarded to the 4th Defendant against the 1st Defendant.

X. Conclusion and Disposition

166. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established her case against the Defendants in respect of the matrimonial character of Kwale/Diani Beach Block 172 and in respect of those transfers and certificates of title which were procured in breach of the Plaintiff's matrimonial rights. Accordingly and for avoidance of any doubts, the Honourable Court makes the following orders for disposal thereof:-

- a) THAT Judgment be and is hereby entered in favour of the Plaintiff as per the Plaint dated 28th March 2017 in respect of the reliefs granted in this Judgment.**
- b) THAT the 4th Defendant's Counter - Claim dated 8th February, 2024 be and is hereby partially allowed.**
- c) THAT a Declaration be and is hereby made that Kwale/Diani Beach Block 172 is matrimonial property as between the Plaintiff and the 1st Defendant.**
- d) THAT an order be and is hereby issued that the transfer and certificate of title issued in favour of the 4th Defendant in respect of Parcel No. 1360 (being part of**

the subdivision of Block 172) be and are hereby set aside to the extent necessary to give effect to this declaration; the Registrar of Lands is directed to cancel or amend the certificate of title accordingly and to make such entries as are necessary to reflect this order.

- e) **THAT** an order of be and is hereby issued directing the 4th Defendant to deliver vacant possession of Parcel No. 1360 to the Plaintiff within 30 days of service of this judgment. In default, the Plaintiff shall be at liberty to apply for a writ of possession and the Court shall authorize enforcement by the Court bailiff and the Officer Commanding Station (OCS) of the relevant police station.
- f) **THAT** the 1st Defendant shall repay to the 4th Defendant the sum of Kenya Shillings Seven Million (Kshs. 7,000,000) being the purchase price paid for Parcel No. 1360, together with proven special damages (including stamp duty and reasonable legal fees) as particularized and proved at trial, subject to any set-off to which the 1st Defendant is lawfully entitled and subject to any reduction for contributory negligence by the 4th Defendant proven on the evidence.
- g) **THAT** permanent injunction be and is hereby issued restraining the Defendants, their servants, agents, transferees and anyone acting under their instructions from further alienating, transferring, charging, encumbering, entering upon, occupying, developing or otherwise dealing with the Land Reference Number

Kwale/Diani Beach Block 172 or any part thereof which is the subject of this suit, pending compliance with the orders of this Court.

- h) THAT interest on the principal sum of Kenya Shillings Seven Million (Kshs. 7,000,000/=) and on any proven special damages awarded under (f) shall run at the court rate from the respective dates of payment by the 4th Defendant until repayment in full.**
- i) THAT the Plaintiff is granted liberty to apply for any further orders necessary for the enforcement of this judgment, including but not limited to orders for possession, writs of possession, and any consequential orders to give effect to the declaration and cancellations ordered herein.**
- j) THAT the Costs in the main suit are awarded to the Plaintiff to be paid by the Defendants severally and jointly. The Plaintiff is also awarded the costs of the Counter - Claim to be paid by the 1st Defendant only as she participated in it. The Counter - Claim is allowed to the extent set out in the Judgment. Costs of the Counter - Claim be and are hereby awarded to the 4th Defendant to be borne by the 1st Defendant.**

IT IS SO ORDERED ACCORDINGLY.

**JUDGMENT DELIVERED THROUGH MICRO - SOFT TEAMS
VIRTUAL MEANS SIGNED AND DATED AT KWALE THIS.....18TH
.....DAY OFMARCH.....2026.**

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Judgement delivered in the presence of:

- a) Mr. Daniel Disii, the Court Assistant.
- b) Mr. Wafula Advocate for the Plaintiff.
- c) Mr. Omollo Advocate for the 1st Defendant.
- d) Mr. Mungai - Kamau Advocates for the 2nd and 3rd Defendants.
- e) M/s. Kinuthia Advocate holding brief for M/s. Waruhiu Advocate for the 4th Defendant.
- f) No appearance for the 5th Defendant.